LEGISLATION

Inheritance By, From and Through Illegitimates

From earliest times, the lot of the child born out of wedlock has been an unhappy one as respects his right to be considered in the succession to the property of his parents and relatives. Concerning him, the early Roman law was entirely mute, treating him as without either father or mother.[1] His position under the later civil law was somewhat improved for, except when he was the issue of an incestuous or adulterous union, he was accorded the privilege of inheriting from his mother.[2] But this advantage was lost under the common law for there the bastard was again relegated to the position of *filius nullius* or *filius populi,* and as such was incapable of inheriting[3] from his mother or putative father.[4] His only heirs or next of kin were his widow and the legitimate issue of his body, and if he died intestate without widow or issue surviving his property escheated to the state.[5] This was the condition of the law in England up until the Legitimacy Act of 1926.[6]

The harsh and inhumane doctrine of the English common law has been carried over and incorporated into the common law of all American jurisdictions with the sole exception of Connecticut. That state from its beginning has recognized the relationship between the illegitimate child and his mother, and has permitted them to inherit from each other.[7] The illegitimate may there also inherit from the other children of his mother,[8] and his children may inherit through him from his maternal relations.[9] In all other states,[10] and in Alaska,[11] Hawaii,[12] and the District of

1. Dickinson's Appeal, 42 Conn. 491 (1875) (tracing the growth of the law); Robbins and Deak, *The Familial Property Rights of Illegitimate Children* (1930) 30 COL. L. REV. 308.

2. *Ibid.* The change resulted from the influx of the *jus naturale* and the reforms of Constantine and Justinian.

3. A bastard could always acquire property by gift *inter vivos* or by will, provided he was clearly designated and was ascertained at the time the gift was to take effect. Wilkinson v. Adam, 1 V. & B. 422 (1812); CO. LITT. *3b; 2 HALSBURY, LAWS OF ENGLAND (2d ed. 1931) § 794. To the effect that a gift to "children" or "issue" is generally held not to include illegitimate children, see Note (1919) 2 A. L. R. 930, 972.

4. 1 BL. COMM. *459; CO. LITT. 123. The sole exception to this rule was the bastard *eigne.* CO. LITT. 244a.

5. CO. LITT. *3b; 1 BL. COMM. *459; 2 HALSBURY, LAWS OF ENGLAND (2d ed. 1931) § 793. This note is concerned only with intestate succession.

6. 16 & 17 GEO. V, c. 60, § 9 (1926).

7. This result has been reached by the interpretation of the word "children" in the general statute of descent and distribution as including illegitimate children. Heath v. White, 5 Conn. 228 (1824).

8. Brown v. Dye, 2 Root 280 (Conn. 1795).

9. Dickinson's Appeal, 42 Conn. 491 (1875).

10. ALA. CODE (1928) §§ 7371, 7372; ARIZ. REV. CODE ANN. (1928) § 273; ARK. DIG. STAT. (Crawford & Moses, 1921) § 3473; CAL. PROB. CODE (Deering, 1931) §§ 255, 256; COLO. ANN. STAT. (Courtright's Mills, 1921) §§ 7844, 7847; DEL. REV. CODE (1915) § 3087, as amd. by Del. Laws 1921, c. 184, p. 604; Del. Laws 1917, c. 229, p. 740, as amd. by Del. Laws 1919, c. 200, p. 531; FLA. COMP. GEN. LAWS (1927) § 5480, as amd. by Fla. Laws 1933, c. 16103, § 30; GA. CODE ANN. (Michie, 1926) §§ 3029, 3030; 1 IDAHO CODE ANN. (1932) §§ 14-104, 14-105; ILL. REV. STAT. (Cahill, 1933) c. 39, § 2; IND. STAT. ANN. (Baldwin, 1934) §§ 3297, 3301; IOWA CODE (1931) §§ 12030, 12031; KAN. REV. STAT. ANN. (1923) §§ 22-121, 22-123, 22-124; KY. STAT. (Carroll, 1930) § 1397; LA. CIVIL CODE (Dart, 1932) § 920; ME.

Columbia,[13] statutes have been passed in an effort to ameliorate the intolerable common law status of the bastard by giving him certain rights of inheritance, and extending the rights of others to inherit from him.

Although motivated by kindly intentions, the great majority of these statutes fall far short of according the bastard full justice. Two glaring deficiencies are evident—the persistent retention of unreasonable restrictions, and poor draftsmanship. Illustrative of the former is the Michigan statute which provides:

> "Every illegitimate child is the heir of his mother, but is not allowed to claim, as representing his mother, any part of the estate of any of her kindred, either lineal or collateral.
>
> "If the illegitimate child dies intestate, his estate descends to the intestate's relatives on the part of his mother as if he had been legitimate."

Why forbid the bastard the right to inherit from his mother's kindred when they may inherit from him? However, the greater fault, at least from the point of view of the lawyer, is the second, which is aptly demonstrated by the Rhode Island statute:

> "A child born out of wedlock is capable of inheriting or transmitting inheritance on the part of his mother as if born in lawful wedlock."

What are the rights of the illegitimate child, or of his lawful issue, against the mother's relatives under such a statute? Even the most radical of the statutes, those of Arizona and North Dakota, are not worded as well as they might be:

> "Every child is the legitimate child of its natural parents and inherits from its natural parents and from their kindred heir, lineal or collateral, in the same manner as if born in lawful wedlock." [14]

REV. STAT. (1930) c. 89, § 3; MD. ANN. CODE (Bagby, 1924) art. 46, § 7, art. 93, § 139; 2 MASS. GEN. LAWS (1932) c. 190, §§ 5, 6; 3 MICH. COMP. LAWS (1929) §§ 13441, 13442; MINN. STAT. (Mason, 1927) §§ 8723, 8724; MISS. CODE ANN. (1930) § 1408; 1 MO. STAT. ANN. (1932) § 314; 2 MONT. REV. CODE ANN. (Choate, 1921) §§ 7074, 7075; NEB. COMP. STAT. (1929) §§ 30-109, 30-110; 4 NEV. COMP. LAWS (Hillyer, 1929) §§ 9860, 9861; 2 N. H. PUB. LAWS (1926) c. 307, §§ 4, 5; N. J. COMP. STAT. (Supp. 1930) tit. 57, § 13, as amd. by N. J. Laws 1930, c. 150, p. 568; tit. 146, § 169d; N. M. STAT. ANN. (Courtright, 1929) §§ 38-114, 38-115; N. Y. CONS. LAWS (Cahill, 1930) c. 13, § 83 (7, 13); N. C. CODE (Michie, 1935) §§ 140, 1654 (9, 10); N. D. COMP. LAWS ANN. (Supp. 1925) § 10500bl; OHIO CODE ANN. (Throckmorton's Baldwin, 1934) § 10503-14; OKLA. STAT. ANN. (Harlow, 1931) §§ 1619, 1620; 1 ORE. CODE ANN. (1930) §§ 10-201, 10-202; PA. STAT. ANN. (Purdon, 1930) tit. 20, §§ 92, 93, 94; R. I. GEN. LAWS (1923) § 5552, as amd. by R. I. Laws 1926, c. 855, p. 294; S. C. CODE (Michie, 1932) §§ 8913, 8914; S. D. COMP. LAWS (1929) §§ 703, 704; TENN. CODE ANN. (Michie, 1932) §§ 8383, 8384, 8385, 8391, 8392, 8393; 8 TEX. ANN. STAT. (Vernon, 1933) § 2582; UTAH REV. STAT. ANN. (1933) §§ 101-4-10, 101-4-11; VT. GEN. LAWS (1917) § 3418; VA. CODE (Michie, 1930) § 5268; 3 WASH. REV. STAT. ANN. (Remington, 1932) §§ 1345, 1346; W. VA. CODE ANN. (1932) c. 42, art. 1, § 5; WIS. STAT. (1931) §§ 237.05, 237.06; WYO. REV. STAT. ANN. (Courtright, 1931) §§ 88-4005, 88-4007. Compilations of these statutes exist but they are incomplete and have not been brought fully up to date. Vernier and Churchill, *Inheritance By and From Bastards* (1935) 20 IOWA L. REV. 216; Stevenson, *Analysis and Tabular Summary of State Laws Relating to Illegitimacy in the United States*, U. S. Dep't of Labor, Children's Bureau, Chart No. 16 (1929).

11. ALASKA COMP. LAWS (1913) §§ 597, 598.
12. HAWAII REV. LAWS (1925) §§ 3307, 3308.
13. D. C. CODE (1929) tit. 25, § 248; tit. 29, § 296.
14. The Arizona statute is quoted. That of North Dakota is almost identical.

The picture presented is a distorted one, liberal in some aspects and conservative in others. The Courts have been left free in situations not expressly or clearly covered by the statutes to apply the common law in all its severity,[15] or to carry out the ambiguous intent of the legislature.[16] An examination of the statutes and the cases interpreting them will readily disclose this.

I. Inheritance by the Illegitimate

a. *From the Mother and Her Kindred*

Forty-seven states, Alaska, Hawaii, and the District of Columbia permit the bastard to inherit from his mother, although the provisions vary greatly. The statutes most commonly read that the bastard shall inherit the estate of his mother as if he had been born in lawful wedlock. Five states provide that he "is capable of inheriting . . . on the part of his mother" as if lawfully begotten.[17] The District of Columbia stipulates that he may not inherit from the mother if she is mentally incapacitated from making a will and remains so until her death. In Florida, although a bastard may ordinarily inherit from his mother, the issue of a prohibited white and negro marriage may not. There is a problem as to whether illegitimate children may still inherit when there are other legitimate children. Five states expressly give them this right.[18] New York and Louisiana [19] deny it. In North Carolina, a bastard may not inherit from the mother land conveyed or devised to her by the father of her legitimate children if any of the latter survive her. But in general illegitimates are permitted to take from the mother as co-heirs with legitimates, even in the absence of an express statutory grant.[20] As to whether a bastard may inherit community property from the mother in states allowing him to inherit only from the mother, the authorities are divided.[21] There is a similar uncertainty as to whether a bastard who has been unintentionally omitted from his mother's

15. "We must also bear in mind that 'legislation admitting illegitimate children to the right of succession is undoubtedly in derogation of the common law and should be strictly construed'." Reynolds v. Hitchcock, 72 N. H. 340, 342, 56 Atl. 745, 746 (1902).

16. "While . . . the statute conferring rights upon illegitimates is in derogation of the common law, still the tendency of the legislation in this State upon this subject shows an intention upon the part of the legislature to remove the rigors of the common law and to establish a rule of descent with reference to illegitimates consonant with the finer sense of justice and right and not to visit the sins of the parents upon the unoffending offspring." Morrow v. Morrow, 289 Ill. 135, 138, 124 N. E. 386, 387 (1919).

17. Arkansas, Missouri, Rhode Island, Virginia, West Virginia. Statutory citations in note 10, *supra*.

18. Delaware, Georgia, New Hampshire, South Carolina, Tennessee. Statutory citations in note 10, *supra*.

19. Louisiana distinguishes between illegitimates whose parents were legally capable of marriage at the time of the conception, and others, granting the latter the right to inherit from the mother if she acknowledges them and has no other lawful children and from the father if he acknowledges and lacks all other possible heirs. Incestuous and adulterine bastards receive a mere "alimony." This type statute is a derivative of the civil law. Minor v. Young, 148 La. 610, 87 So. 472 (1921).

20. Opdyke's Appeal, 49 Pa. 373 (1865); Alexander v. Alexander, 31 Ala. 241 (1857); Bennett v. Toler, 15 Gratt. 588 (Va. 1860). But see Ferrie v. Public Administrator, 3 Bradf. 249 (N. Y. 1855).

21. Lee v. Frater, 185 S. W. 325 (Tex. Civ. App. 1916) (holding that the bastard may inherit community property from the mother). *Contra:* Wasmund v. Wasmund, 90 Wash. 274, 156 Pac. 3 (1916).

will comes within statutes providing that "children" so neglected may take against the will.[22]

There is a prevalent tendency to permit the illegitimate child to inherit through his mother from his maternal relatives. Thus eight states [23] provide that the bastard may inherit from the mother's "next of kin" or "kindred", and three states [24] say he may inherit from any person from whom his mother might have inherited. Mississippi and South Carolina provide for such succession only if there are no other legitimate heirs of such kindred. On the other hand, twelve states [25] and Alaska have provisions that although the bastard may inherit from his mother, he may not represent his mother by inheriting from her relations, lineal or collateral. Inasmuch as the remaining statutes make no specific mention of inheritance from the mother's kindred, an interesting problem of construction is raised. The statutes providing that the bastard is capable of inheriting "on the part of the mother" have been usually strictly interpreted as meaning "from" the mother and hence that the bastard may not inherit from his maternal relations.[26] The same treatment has been accorded those statutes merely saying that an illegitimate child inherits from the mother, or from the mother as if legitimate.[27]

b. *From Other Illegitimates*

Under the common law rule that a bastard could not be an heir and could have no heirs other than his issue or his spouse, illegitimate brothers or sisters could not inherit from each other.[28] Today this privilege is commonly granted. Express statutory provisions are found in several states.[29] Tennessee and Hawaii provide that the bastard's "brothers and sisters" by the same mother inherit from him, and although there is room for the possible contention that only legitimate brothers and sisters are meant, illegitimates have been held to be included.[30] Similarly by judicial decision illegitimates come within statutes providing that the bastard's mother and her "children" inherit from him.[31] Under the Ohio statute which gives

22. Kent v. Barker, 68 Mass. 535 (1854) (holding that the bastard may not take against the will). *Contra:* Wardell's Estate, 57 Cal. 484 (1881).

23. Arizona, Maine, Massachusetts, New Hampshire, New Jersey, North Dakota, Pennsylvania, South Dakota. Statutory citations in note 10, *supra.*

24. Illinois, Indiana, Ohio. Statutory citations in note 10, *supra.* Bales v. Elder, 118 Ill. 436, 11 N. E. 421 (1887).

25. California, Florida, Idaho, Michigan, Minnesota, Montana, Nebraska, North Carolina, Oklahoma, Oregon, Washington, Wisconsin. Statutory citations in note 10, *supra.* Bettis v. Avery, 140 N. C. 184, 52 S. E. 584 (1905); *In re* Pratt's Estate, 160 Okla. 256, 16 P. (2d) 104 (1932).

26. Stevenson v. Sullivant, 2 Wheat. 207 (U. S. 1820); William v. Kimball, 35 Fla. 49, 16 So. 783 (1895); Jackson v. Jackson, 78 Ky. 390 (1880). But see *Re* Mericlo, 63 How. Pr. 62, 65 (N. Y. 1882).

27. Reynolds v. Hitchcock, 72 N. H. 340, 56 Atl. 745 (1903); *Re* Mericlo, 63 How. Pr. 62 (N. Y. 1882); *Re* Lauer, 76 Misc. 117, 136 N. Y. Supp. 325 (Surr. Ct. 1912). *Cf.* Barron v. Zimmerman, 117 Md. 296, 83 Atl. 258 (1912).

28. 1 BL. COMM. *459.

29. District of Columbia, Georgia, Maryland, New Jersey, North Carolina, Pennsylvania, South Carolina, Statutory citations in note 10, *supra.* Brewer v. Blougher, 14 Pet. 178 (U.S. 1840); Ashe v. Camp Mfg. Co., 154 N. C. 241, 70 S. E. 295 (1911).

30. McCline v. Ridley, 134 Tenn. 164, 183 S. W. 736 (1915); see Turnmire v. Mayes, 121 Tenn. 45, 53, 114 S. W. 478, 480 (1908).

31. Colorado, Illinois, Mississippi, Wyoming. Statutory citations in note 10, *supra.* Huddleston v. Henderson, 181 Ill. App. 176 (1913).

the bastard the right to inherit from his mother and from those from whom she may inherit, and which gives to the mother the right to inherit from her illegitimate children, it would seem that succession between illegitimates is possible. Those statutes providing that an illegitimate child is capable of inheriting and transmitting inheritance "on the part of" his mother present a difficult question here also, but the weight of authority seems to favor inheritance between illegitimates under them.[32] Strict construction, nevertheless, would forbid inheritance between bastards in the absence of express statutory provision, and this result has been reached in some jurisdictions.[33] Of course the more advanced Arizona and North Dakota statutes declaring legitimate all children of their natural parents obviate the problem.

c. *Between Legitimates and Illegitimates*

At common law, an illegitimate could not inherit from his legitimate brothers or sisters, nor they from him.[34] Outside of the few statutes expressly according the bastard the right to inherit from his legitimate brothers and sisters,[35] the tendency seems to be to deny him that right. North Carolina expressly denies it. Statutes providing that illegitimates may inherit from each other will not be stretched to allow them to inherit from legitimates.[36] It has been held that a statute making the bastard an heir of any person from whom his mother might have inherited empowers him to succeed his legitimate brothers and sisters.[37] But the opposite result has been reached under statutes rendering the bastard capable of inheriting and transmitting estates on the part of his mother as if legitimate.[38]

Five states have expressly provided that a legitimate child may be the heir of an illegitimate child of his mother,[39] but even in the absence of express provision the courts readily stretch vague language to let in other legitimate children.[40] However, the opposite result has been reached by strict construction.[41] The case of *Woodward v. Duncan* [42] is anomalous in this respect for while the court thought legitimate brothers and sisters came within a statute allowing a bastard's "brothers and sisters" to take his estate, still it did not think the illegitimate should be so benefited.

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32. Butler v. Elyton Land Co., 84 Ala. 384, 4 So. 675 (1887); Perkins v. Perkins, 166 S. W. 915 (Tex. Civ. App. 1914).

33. State v. Looney, 149 Ore. 287, 40 P. (2d) 735 (1935), (1935) 15 ORE. L. REV. 74; Woltemate's Appeal, 86 Pa. 219 (1878). *Contra:* Bahnsen v. Burl, 95 Okla. 191, 218 Pac. 846 (1923).

34. 1 BL. COMM. *459.

35. Massachusetts, New Jersey, Pennsylvania, South Carolina, Tennessee. The North Dakota and Arizona statutes are probably broad enough to cover this question. See statutory citations in note 10, *supra.*

36. Overton v. Overton, 123 Ky. 311, 96 S. W. 469 (1906).

37. Morrow v. Morrow, 289 Ill. 135, 124 N. E. 386 (1919); Parks v. Kimes, 100 Ind. 148 (1885).

38. Stevenson v. Sullivant, 5 Wheat. 207 (U. S. 1820). But see Garland v. Harrison, 8 Leigh 368, 379 (Va. 1837).

39. Georgia, Mississippi, New Jersey, North Carolina, South Carolina. See statutory citations in note 10, *supra.* In Georgia, the legitimate child inherits from the deceased only in the absence of other surviving illegitimate children.

40. Powers v. Kite, 83 N. C. 156 (1880); Lewis v. Eutsler, 4 Ohio St. 354 (1854).

41. State v. Looney, 149 Ore. 287, 40 P. (2d) 735 (1935) (1935) 15 ORE. L. REV. 74; Irvine v. Newlin, 63 Miss. 192 (1885).

42. 1 Coldw. 562 (Tenn. 1860).

d. *From the Father and His Kindred*

An illegitimate child, being *filius nullius,* of course could not inherit from his father at common law.[43] This is still the rule in most of the states,[44] including Connecticut.[45] In almost half the states, however, there are provisions whereby the illegitimate child may become the heir of his father. The Arizona and North Dakota statutes give him this privilege as a matter of indefeasible right. Fifteen states provide that a bastard may inherit from his father if the father has acknowledged him to be his son.[46] The Indiana statute introduces the additional requirement that the father be not survived by legitimate children or their descendants. In Louisiana, "natural children" may inherit from their father if he has acknowledged them, and if there are no other possible heirs in any degree.[47] The statutes of Wisconsin and Iowa are a bit broader than most in that they provide for inheritance in the event that paternity is proved, as well as when it is acknowledged.

The acknowledgment is usually required to be in writing and signed in the presence of a competent witness, but it is commonly held that the writing need not have been intended as an acknowledgment.[48] However it must be clear and unequivocal.[49] Once given, it cannot be revoked.[50] In California, although the statute requires a writing, it has been held that repeated actions and assertions definitely admitting paternity are sufficient.[51] In a few states, by statute, the recognition need not be by writing provided it is open and notorious.[52] Most jurisdictions have determined that a bastard who has been acknowledged may inherit even if there are other legitimate children of the father, although the statutes are all silent on this point.[53] It should be noted that under some statutes acknowledgment by the father

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43. See footnote 3, *supra.*

44. Most statutes are silent concerning the illegitimate's right to take from his father, and hence the common law rule applies. Pennsylvania expressly provides that the existing common law with respect to the father is not to be changed.

45. Dickinson's Appeal, 42 Conn. 491 (1875) *semble;* Eaton v. Eaton, 88 Conn. 269, 91 Atl. 191 (1914) *semble.*

46. Alabama, California, Florida, Idaho, Kansas, Maine, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, South Dakota, Utah, Washington. It should be noted here that acknowledgment is not the same as legitimation. Legitimation is a process whereby a child born out of wedlock is given the general status of a fully legitimate child. By acknowledgment, the illegitimate is given the privileges of a legitimate for certain purposes only. Hunt v. Hunt, 37 Me. 333 (1853). On the subject of legitimation, see Note (1929) 64 A. L. R. 1124. TIFFANY, DOMESTIC RELATIONS (3d ed. 1921) 300. For a compilation of legitimation statutes, see Stevenson, *Analysis and Tabular Summary of State Laws Relating to Illegitimacy in the United States,* U. S. Dep't of Labor, Children's Bureau, Chart No. 16 (1929).

47. See footnote 19, *supra.*

48. Rohrer v. Muller, 22 Wash. 151, 60 Pac. 122 (1900); Crane v. Crane, 31 Iowa 296 (1871); *cf.* Williams v. Reid, 130 Minn. 256, 153 N. W. 324 (1915).

49. Pederson v. Christofferson, 97 Minn. 401, 106 N. W. 958 (1906); Sandford's Estate, 4 Cal. 12 (1854).

50. Miller v. Pennington, 218 Ill. 220, 75 N. E. 919 (1905).

51. Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915 (1892).

52. Indiana, Iowa, New Mexico. Statutory citations in note 10, *supra.* It is sufficient if the recognition is general, rather than universal. Blair v. Howell, 68 Iowa 619, 28 N. W. 199 (1886). An occasional denial will not defeat the recognition. Luce v. Tompkins, 177 Iowa 168, 158 N. W. 535 (1916).

53. Alston v. Alston, 114 Iowa 29, 86 N. W. 55 (1901); Caldwell v. Miller, 44 Kans. 12, 23 Pac. 946 (1890). *Contra:* Wilson v. Bass, 70 Ind. App. 116, 118 N. E. 379 (1918).

that the child is his son, receiving him into the family, and otherwise treating him as his own child, constitutes adoption, which renders the child legitimate for all purposes.[54]

Nine states, while granting the illegitimate the right to take from the father upon recognition, forbid him the right to take from his father's kindred by representation.[55] Maine alone has expressly enacted that the bastard child may inherit from the kindred of the one who has acknowledged him as his son.

2. Inheritance From and Through the Illegitimate

a. *By the Spouse*

It must be remembered that at common law a surviving spouse has rights of dower or curtesy.[56] Several of the illegitimacy statutes expressly recognize the rights of the spouse,[57] but even in the absence of such recognition the spouse will undoubtedly be protected by the general statutes of descent and distribution. The inadequacy of the statutes on this point, however, is another illustration of the poor draftsmanship so characteristic of them.

b. *By the Mother and Her Kindred*

In forty-three states, Alaska, Hawaii and the District of Columbia, there are statutes providing for inheritance by the mother from her illegitimate child, and in Connecticut [58] this result is accomplished at common law. The Arizona and North Dakota statutes, while not express on the point, are probably broad enough to cover it—or at least will be broadly construed in the light of the obvious intent of the legislature completely to abrogate the common law rule.[59] The Florida and Louisiana statutes likewise are silent in this respect, but in Louisiana at least it has been held that the mother inherits if she has acknowledged the child.[60] It has also been determined that where the mother is given the right to inherit from her bastard child such right does not include inheritance from the descendants of such child.[61]

In the majority of the states also, inheritance from the bastard through the mother is permitted, although there is considerable variation in the wording of the statutes. Thus twenty-five jurisdictions grant the right to the mother's "kindred" or "heirs." [62] Five states provide that the bastard

54. Utah Rev. Stat. Ann. (1933) § 14-4-12; Nev. Comp. Laws (Hillyer, 1929) § 9483; Cal. Civil Code (Deering, 1931) § 230. *Re* Forney, 43 Nev. 227, 184 Pac. 206 (1919); *Re* Garr, 31 Utah 57, 86 Pac. 757 (1906).

55. California, Florida, Idaho, Minnesota, Montana, Nebraska, Oklahoma, Washington, Wisconsin. See statutory citations in note 10, *supra*.

56. Co. Litt. *3b; 2 Halsbury, Laws of England (2d ed. 1931) § 793.

57. Alaska, Colorado, Hawaii, Illinois, New Jersey, New York, Oregon, Tennessee, Vermont, Wyoming. See statutory citations in note 10, *supra*.

58. Eaton v. Eaton, 88 Conn. 269, 91 Atl. 191 (1914).

59. But the opposite result is always possible as is illustrated by Alabama Ry. Co. v. Williams, 78 Miss. 209, 28 So. 853 (1900), holding that the mother did not inherit from her illegitimate child under the former Mississippi statute providing that "illegitimate children shall inherit the property of their mothers and from each other."

60. Lacosst's Succession, 142 La. 673, 77 So. 497 (1917).

61. Hardesty v. Mitchell, 302 Ill. 369, 134 N. E. 745 (1922).

62. Alabama, Colorado, Delaware, District of Columbia, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Washington, Wisconsin, Wyoming. See statutory citations in note 10, *supra*.

is capable of "transmitting inheritance on the part of the mother" as if he had been legitimate.[63] It is probable that all these statutes will be construed to grant rights of inheritance to all blood relations of the mother, says Vernier,[64] and such rights are clearly granted in California, Tennessee, New York, Massachusetts, Vermont, and Michigan. Specific relatives of the mother are named in the statutes of North Carolina, Georgia and Hawaii. A few states [65] fail to make any provision at all concerning the mother's kindred, but in Arizona and North Dakota at least it is likely that these will be included by judicial interpretation.

c. *By the Father and His Kindred*

In a few states, the legislatures have stipulated that the father may succeed his illegitimate child if there has been mutual recognition of the relationship.[66] New Mexico and Kansas further provide that in such case the mother and her heirs take preference over the father and his heirs. Although the Louisiana statute does not mention inheritance by the father, the father may inherit from his illegitimate son if the latter has acknowledged him.[67] Evidently the requisites of the acknowledgment or recognition here are the same as those where the illegitimate seeks to inherit from his father.

d. *By the Bastard's Children and Their Descendants*

At common law, a bastard could transmit property to the legitimate heirs of his body. Many statutes [68] today recognize this principle; but even without mention of it, it probably exists in all jurisdictions by reason of the rule that statutes in derogation of the common law must be strictly construed. Hence the only real problem here is whether or not the children of the bastard and their descendants may inherit through him from persons from whom he may inherit. In Connecticut, even without a statute, the rule is that the bastard's children succeed to his rights and hence may inherit from his maternal relatives.[69] Statutes in nine jurisdictions expressly enable the bastard's issue to represent him by inheriting anything which the bastard would be entitled to take if living.[70] And quite logically it has been held under a similar statute that the bastard's issue may not inherit from a person from whom the bastard might not have inherited.[71] In three states, the issue of the illegitimate are restricted to inheriting from the mother or the

63. Arkansas, Missouri, Rhode Island, Virginia, West Virginia. The Ohio and Texas statutes are very similar. See statutory citations in note 10, *supra.*

64. Vernier and Churchill, *Inheritance By and From Bastards* (1935) 20 IOWA L. REV. 216.

65. Alaska, Arizona, Iowa, Kansas, New Mexico, North Dakota. See statutory citations in note 10, *supra.*

66. Iowa, Kansas, New Mexico. See statutory citations in note 10, *supra.*

67. Lacosst's Succession, 142 La. 673, 77 So. 497 (1917) *semble.*

68. Alaska, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New York, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, Wyoming. See statutory citations in note 10, *supra.*

69. Dickinson's Appeal, 42 Conn. 491 (1875).

70. Delaware, District of Columbia, Georgia, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, New York. See statutory citations in note 10, *supra.* Bales v. Elder, 118 Ill. 436, 11 N. E. 421 (1886) (good exposition of the effect of such a statute).

71. Pratt v. Atwood, 108 Mass. 40 (1871).

brothers and sisters of the illegitimate.[72] The states with provisions that bastards are capable of "transmitting inheritance on the part of the mother" as if legitimate have construed such statutes broadly to enable the children of such bastards to inherit estates to which the bastard would have been entitled if living.[73] The statutes which merely define the illegitimate's rights and mention nothing of the rights of his children present a question of unusual interest. It has been argued that inasmuch as the illegitimate is merely given capacity to inherit property from his mother or other persons, and inasmuch as his death prevented his actually inheriting such property, he cannot under the statute transmit to his descendants what he did not have.[74] However, the more widely accepted point of view seems to be to treat the statute as giving the bastard a vested right to inherit from certain persons and to let him transmit this right under the privilege which he has, even in the absence of statute, of transmitting inheritance to his legitimate offspring.[75] Under the common provision that the bastard is the heir of his mother and inherits her estate "as if born in lawful wedlock", emphasis also has been laid upon the quoted phrase as indicative of the legislature's intent to include the bastard's issue.[76] Likewise where by statute a bastard may inherit from his father who has acknowledged him, the more common rule seems to be that this right carries down the bastard's line of descendants.[77] Of course, since the descendants of the illegitimate will inherit through him by representation, they stand upon the same footing; if at his death he was incapable of inheriting a particular estate his descendants will be also.[78]

Inheritance Under European Systems

The efforts made by the various states to improve the unhappy status of the illegitimate child have been duplicated in Europe, beginning with the revision of political thought during the eighteenth century. In France,[79] the bastard child is severely handicapped by the fact that his rights of inheritance are made to depend upon voluntary recognition of him by his parents or proof of parenthood in filiation proceedings. Even then he has no right of succession to the lineal or collateral kindred of his father or mother, and his share in the estate of his father and mother is less than he would have received if legitimate. Upon recognition or filiation, the parents inherit from the child. An adulterine or incestuous bastard has no rights of inheritance against his parents, being limited to a mere claim for aliment. Germany [80] has been more liberal. Under its Code, an illegitimate child

72. Alabama, Mississippi, North Carolina. See statutory citations in note 10, *supra*.

73. Grundy v. Hadfield, 16 R. I. 579, 18 Atl. 186 (1889); Sutton v. Sutton, 87 Ky. 216, 8 S. W. 337 (1888).

74. Steckel's Appeal, 64 Pa. 493 (1870); Curtis v. Hewins, 52 Mass. 294 (1846).

75. *Re* Cameron, 170 Mich. 578, 136 N. W. 451 (1912); Foster v. Lee, 172 Ala. 32, 55 So. 125 (1911).

76. See *Re* Cameron, 170 Mich. 578, 583, 136 N. W. 451, 453 (1912).

77. Johnson v. Bodine, 108 Iowa 594, 79 N. W. 348 (1899); McKellar v. Harkins, 183 Iowa 1030, 166 N. W. 1061 (1918).

78. Edwards v. Gaulding, 38 Miss. 118 (1859); Turnmire v. Mayes, 121 Tenn. 45, 114 S. W. 478 (1900).

79. Robbins and Deak, *Familial Property Rights* (1930) 30 COL. L. REV. 321; Legis. (1916) 16 COL. L. REV. 698.

80. Robbins and Deak, *supra* note 80, at 324.

occupies the position of a legitimate child as to the mother and her relatives. Unless at the time of the conception marriage of the parents was forbidden, the child may be declared legitimate as to the father upon petition to the government containing a declaration of recognition by the father. And should the father fail to comply, he still has a claim against the father and his estate for support. England likewise has taken steps to ameliorate the hardships of the bastard. By the Legitimacy Act of 1926,[81] if the mother dies intestate and without other legitimate issue, the bastard and his issue may take any interest he would have taken if legitimate. Conversely, the mother may take any interest in the estate of her intestate illegitimate child which she would have taken if he had been legitimate and she the only surviving parent. By far the most radical of illegitimacy laws is the Castberg Law of Norway,[82] passed in 1915, which gives the illegitimate the same rights of inheritance in every way as the legitimate possesses. He may inherit from his father, his mother, and their relatives, and these from him. The relationship to the father may be established either by the father's voluntary recognition of his paternity or by proof thereof in court.

Conclusion

Thus it may be seen that there has been a progressive attempt, both at home and abroad, to transform the status of the illegitimate from that of *filius nullius* to one of full legitimacy. In Norway alone has the extreme been achieved; everywhere else a condition of transition still exists. In the American jurisdictions, illegitimacy legislation has been widespread and frequent,[83] but the progress forward has not been great in the last two hundred years. What advance has been made has been hard fought, and it is regrettable that more has not been made of opportunities which certainly have existed. In many instances, legislatures, spurred by harsh decisions or by an abstract sense of social justice, have enacted measures clearly meant as sweeping reforms, but too frequently these measures have been so poorly drafted that conservative courts have undone the good work. On the other hand, the courts themselves have in many respects led the advance by reading into vague statutes the presumed intention of the legislature. This accomplishes the desired result but necessitates a disregard for the time-honored rule that statutes in derogation of the common law must be strictly construed.

All will agree that the only certain method of bringing about any real change in this field is by statutes, clearly and fully drawn to cover all possible situations. The only question to be answered then is, how far should such statutes go? There is no true basis in reason for cutting off the bastard's rights of inheritance at the mother, or at the maternal relatives, or at the father upon his acknowledgment of paternity. The physical connection between a child and its parents is just as much present whether the parents are legally married to each other or not, and the absence of the

81. 16 & 17 GEO. V, c. 60, § 9 (1926).

82. Castberg, *Children's Rights Laws and Maternity Insurance in Norway* (1916) 16 J. SOC. COMP. LEG., pt. 2, 283; Magnusson, *Norwegian Law of Illegitimacy* (1918) U. S. Dep't of Labor, Children's Bureau, Leg. Ser. No. 1, Pub. No. 31.

83. For a conception of the continual change in such legislation, see *Illegitimacy Laws of the United States Passed During the Years 1919 to 1922* (1922) U. S. Dep't of Labor, Children's Bureau.

marriage tie does not justify the oppression to which the bastard has been and still is subjected. The basic idea behind the civil and common law rules and the opposition to any statutory changes therein has been a moral antipathy to illicit sex relations as tending to degrade and disintegrate the family. But this is a poor application of morals in determining what laws should be. Rather should we turn to the function of the family as a guide, and from this point of view to refuse the illegitimate child the rights of inheritance possessed by his legitimate brother is unjustifiable. The real evil is the illicit relationship of the parents, not the birth of the bastard; and placing a stigma upon him has certainly had small deterrent effect upon illegitimacy. The knowledge that illicit offspring can no longer be relegated to anonymity should have a better effect.

The possibility of fraudulent claims is a more serious objection; but that is purely a question of proof and, as has been suggested,[84] could be removed by requiring the claimant to prove his filiation by more than a preponderance of the evidence. Also to be reckoned with is the argument [85] that small good will be done the illegitimate by giving him the status of legitimacy so long as there continues the right accorded the father under Anglo-American law to disinherit a child. It would be ill-advised to attempt to take this right away as to the illegitimate alone, but at any rate while it exists he is in no worse position than a legitimate child who is unfortunate enough to incur the dislike of his father. And in the event of his father's intestacy the benefit is apparent.

The problem of the incestuous and the adulterine bastard will probably be more difficult of solution than that of the child born of single parents. Admittedly, this is illegitimacy in its most distasteful aspect, but the child is just as blameless in both cases and the treatment should be the same. If it be argued that the surviving wife and children will be subjected to shame when at the death of the husband and father the bastard appears to claim his inheritance, it must be answered that it is the existence of the bastard, not his appearance, which is the cause. If his existence becomes known for any other reason the disgrace will be as great.

While the goal suggested has already been advocated in this country,[86] there is a feeling that the time is not yet ripe to make the leap. The Commissioners on Uniform State Laws omitted all reference to rights of inheritance from their Uniform Illegitimacy Act upon the ground that opposition to any radical change in that field would defeat adoption of the statute in most states.[87] The model statute proposed by Professor Eagleston merely provides for succession between the bastard, his mother and his

84. Vernier and Churchill, *Inheritance By and From Bastards* (1935) 20 IOWA L. REV. 216, 220.

85. Freund, *Illegitimacy Laws of the U. S.* (1919) U. S. Dep't of Labor, Children's Bureau, Pub. No. 42, at 30.

86. At sectional conferences called by the Children's Bureau of the U. S. Dep't of Labor in 1921 to discuss illegitimacy legislation, resolutions were adopted practically advocating full legitimation. *Standards of Legal Protection for Children Born Out of Wedlock* (1921) U. S. Dep't of Labor, Children's Bureau, Pub. No. 77.

87. Stevenson, *Analysis and Tabular Summary of State Laws Relating to Illegitimacy in the U. S.* (1929) U. S. Dep't of Labor, Children's Bureau, Chart No. 16, p. 48.

The Uniform Act has been adopted in seven states and there the former illegitimacy provisions have been retained. See 9 U. L. A. (1932) 185 and note 10, *supra.*

maternal relatives.[88] Professor Freund also is of the opinion that all changes should be by way of compromise for the time being.[89] But such hesitancy at this advanced date seems unwarranted. Recognition is widespread that the treatment accorded illegitimate children is unjust; courts themselves frequently speak sympathetically of them while deciding otherwise under outmoded statutes. It is time the Castberg Law should find a parallel in the United States.[90]

M. H. S.

88. Eagleston, *Intestacy Act* (1935) 20 IOWA L. REV. 244, 257.

89. *Standards of Legal Protection for Children Born Out of Wedlock* (1921) U. S. Dep't of Labor, Children's Bureau, Pub. No. 77, p. 26.

90. There has been no attempt in this note to deal with the problems of support, legitimation or conflict of laws.