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DESCENT AND DISTRIBUTION--ILLEGITIMATE--INHERITANCE THROUGH FATHER FROM COLLATERAL KINDRED OF FATHER-- INDIANA STATUTE

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DESCENT AND DISTRIBUTION—ILLEGITIMATE—INHERITANCE THROUGH FATHER FROM COLLATERAL KINDRED OF FATHER—INDIANA STATUTE—Appeal by illegitimate from an adverse ruling in the trial court,¹ presenting the question whether an illegitimate son, acknowledged by his father, can inherit a share of the estate of the father's sister who survived the father. *Held*, reversing

¹ Phillips filed exceptions to the final report of the administrator of the estate of Sarah A. Bailey, deceased, in the Decatur Circuit Court; later a change of venue to the Rush Circuit Court was ordered, and it was there ruled that the expectant had no interest in the estate and was not an heir of the decedent.

² Phillips v. Townsend, (Ind. App. 1945) 60 N.E. (2d) 297, an acknowledged illegitimate child could inherit through his putative father from the sister of the putative father, where the sister died intestate after the putative father, leaving surviving her only nieces, nephews, grand-nieces, and grand-nephews. Ind. Ann. Stat. (Burns, 1933) § 6-2309. Chief Judge Draper and Judge Crumpacker dissented.

the Appellate Court,² although the statute³ grants to an acknowledged illegitimate the right to inherit *from* his father in the event that no legitimate children nor descendants of legitimate children survive the father, an illegitimate cannot inherit *through* his father from the father's sister. *Phillips v. Townsend*, (Ind. 1945) 62 N.E. (2d) 860.

This decision states a common solution to the problem frequently arising as to whether statutes providing for inheritance by an illegitimate acknowledged by his father are to be given effect as conferring a limited right of inheritance from the father, or whether the effect of such recognition by the father is to render the acknowledged bastard a legitimate child of the father for all purposes of inheritance.⁴ Previous Indiana decisions were weighted in favor of the construction placed on the statute in the recent case.⁵ However, decisions by the Appellate Court and by the courts of other jurisdictions do indicate that the opposite construction has merit.⁶ The tendency to strict construction of

³ Ind. Ann. Stat. (Burns, 1933) § 6-2309, Ind. Acts (1901) § 1: "The illegitimate child or children of any man dying intestate and having acknowledged such child or children during his lifetime as his own shall inherit his estate, both real and personal, and shall be deemed and taken to be the heir or heirs of such intestate in the same manner and to the same extent as if such child or children had been legitimate. . . . And be it provided, That the provisions of this act shall not apply where the father of the illegitimate child, at his death, had surviving legitimate children or descendants of legitimate children."

⁴ See 4 VERNIER, *AMERICAN FAMILY LAWS* 189 et seq. (1936); MADDEN, *PERSON AND DOMESTIC RELATIONS*, § 249 (1931); 24 A.L.R. 570 et seq. (1923); 64 A.L.R. 1124 (1929), and 83 A.L.R. 1330 at 1335 (1933).

For discussion of general problem and collection of cases see, Vernier and Churchill, "Inheritance By and From Bastards," 20 IOWA L. REV. 216 (1935).

⁵ Under Ind. Ann. Stat. (Burns, 1933) § 6-2309, an illegitimate child can inherit from but not through his putative father; also that the statute is one of descent, and thereunder, the legal status of the child is not changed from illegitimacy to legitimacy by the father's acknowledgment. *Hall v. Fivecoat*, 110 Ind. App. 704, 38 N.E. (2d) 905 (1942); *Wilson v. Bass*, 70 Ind. App. 116, 118 N.E. 379 (1918).

See also, *Truelove v. Truelove*, 172 Ind. 441, 86 N.E. 516 (1909); *Jackson v. Hocke*, 171 Ind. 371, 84 N.E. 830 (1908), where plaintiff's claim resting on representation under Ind. Ann. Stat. (Burns, 1908) § 2998, was denied, the court holding that the statute conferred a limited right of inheritance, not inheritable status.

⁶ Illegitimate child, legitimated according to the provisions of the statute [Ind. Ann. Stat. (Burns, 1933) § 6-2309, Ind. Acts (1901) § 1], is granted the right to inherit from the father in the same manner as his legitimate children. *Selby v. Brenton*, 75 Ind. App. 208, 130 N.E. 448 (1921).

Legitimate children of an illegitimate acknowledged by his father who had no legitimate children inherit by representation from grandfather who survived the father, on the theory that the statute, once operative, confers legitimacy. *Morin v. Holliday*, 39 Ind. App. 201, 77 N.E. 861 (1906).

See also *Smith v. Smith*, 105 Kan. 294, 183 P. 538 (1919), to the effect that an illegitimate child who has been duly recognized by his father may inherit through the father from his collateral kindred in the same way as a child born in lawful wedlock. Note also the dissent by Mr. Justice Burch.

For collection of cases see 3 R.C.L. § 53, p. 772 et seq.; and MADDEN, *PERSONS AND DOMESTIC RELATIONS* 353-6 (1931).

remedial statutes is clearly traceable to the common law rule that an illegitimate child was *nullius filius*, and had no rights of inheritance. When most jurisdictions permit an illegitimate to inherit from his mother, and many jurisdictions permit an illegitimate to inherit from the mother's collateral kindred, little reason appears for restricting the rights of inheritance of acknowledged illegitimate from the father and the father's collateral kindred. Yet when, as is often the case, the acknowledgment statute is but one of many sections of the statutes of descent and distribution, conflicts do develop when the particular section conferring a right of inheritance from the father is extended to place the illegitimate in the line of descent as heir for all purposes.⁷ Some fifteen states have statutes similar to the Indiana statute construed in the recent case; and the construction approved in the principal case is in accord with the interpretation of a majority of the courts in these states.⁸ An examination of the decisions and statutes reveals a need for more specific legislation covering the possible situations in the field of legitimation. As indicated in the principal case, these statutes have the effect of a rule of property once interpreted.⁹ It is submitted that the decision in the principal case is consistent with other sections of the Indiana statute,¹⁰ as well as with the rule of *stare decisis*. The remedy for difficulties in statutory

⁷ See "Inheritance By, From and Through Illegitimates," 84 UNIV. PA. L. REV. 531 (1936), for general discussion of problem.

Caveat: Frequently legislation on the particular point here involved may be found under Descent and Distribution; but often sections relative to legitimacy and adoption must be seen to clarify the position of the sections found under Descent and Distribution. See 4 VERNIER, AMERICAN FAMILY LAWS, § 242-248 (1936), on Legitimation.

⁸ Nine of these states require a writing as evidence of recognition or acknowledgment; while Indiana, Iowa, and New Mexico require only that the recognition be open and notorious.

It is almost uniformly held that legitimation by acknowledgment does not confer a right to inherit through the putative father, 4 VERNIER, AMERICAN FAMILY LAWS, § 246 (1936).

For analysis of statutes see Stevenson, "Analysis and Tabular Summary of State Laws Relating to Illegitimacy in the United States, In Effect January 1, 1928, and the Text of Selected Laws," United States Department of Labor, Children's Bureau, Chart No. 16 (1929), also table in MADDEN, PERSONS AND DOMESTIC RELATIONS 194-205 (1931).

A.L.I. Uniform Illegitimacy Act does not purport to deal with the problem considered in the principal case, 9 U.L.A. 185. But see Conflict of Laws Restatement, Proposed Final Draft No. 1, § 149 (1934), for reciprocity in legitimation.

For comment on the 1944 Louisiana statute, see 19 TULANE L. REV. 325 (1944).

⁹ Dailey v. Pugh, 83 Ind. App. 431, 131 N.E. 836 (1921); Harrow v. Myers, 29 Ind. 469 (1868); Stewart v. Wells, 47 Ind. App. 228, 94 N.E. 235 (1911).

Also see note on construction of Ohio statute in 7 OHIO ST. L. J. 441 (1941).

¹⁰ See Ind. Ann. Stat. (Burns, 1933) §§ 6-2306—6-2312; Dailey v. Pugh, 83 Ind. App. 431, 131 N.E. 836 (1921), to the effect that a construction of a statute, even though resting on a single decision, should be followed under application of the rule of *stare decisis*.

construction, as indicated by the principal case, is properly the province of the legislature.¹¹

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¹¹ "If the statutes of descent and distribution are construed too harshly . . . concerning the rights of illegitimates, the remedy is with the Legislature, not the courts." Headnote for *Phillips v. Townsend*, (Ind. 1945) 62 N.E. (2d) 860 at 860.