DECLARATION OF PATERNITY

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The purpose of this comment is to explore the effect of a declaration of legitimacy and in particular the effect the declaration has and upon whom and for what purposes it is binding. Further, it deals in the same way with the effect under the present law of an affiliation order.

I

UNDER THE LAW OF ENGLAND

The power, in England, to grant declarations in family matters stems from two sources: (a) enabling statute, and (b) the inherent jurisdiction. The English Law Commission Working Paper number 48, "Declarations in Family Matters" gives us the current English position with respect to these two sources of power.

1. Declarations Under the Enabling Statute

Sections 1 and 2 of the Legitimacy Declaration Act 1858 conferred upon the court for the divorce and matrimonial causes the power to make declarations of legitimacy. These sections were repealed by the Supreme Court of Judicature (Consolidation) Act 1925, section 188, which abolished the court's power to make declarations of illegitimacy. This was further repealed by the Matrimonial Causes Act 1950, section 17, which was repealed by the Matrimonial Causes Act 1965 and replaced by section 39 of the Act. Section 2 of the Legitimacy Act 1926 empowered the court to make a declaration of legitimacy of legitimated persons and applied to proceedings for such declaration the safeguards for the public interest and individuals affected. This power, to declare a legitimation, is now included in section 39 of the 1965 Act. Section 39

of the Matrimonial Causes Act 1965, which is Appendix 1, empowers the court to make declarations:

(1) that the applicant is legitimate;

(2) that the applicant or any ancestor of his has been legitimated;

(3) that the applicant's marriage or that of his parents or of his grandparents was a valid marriage;

(4) that the applicant is a British subject.

A person claiming that he or his parents or any remote ancestor became or has become a legitimated person, may apply by a petition to the High Court or by originating application to a County Court. Where an application is made to a County Court, the County Court, if it considers that the case is one which owing to the value of the property involved or otherwise ought to be dealt with by the High Court, may, and if so ordered by the High Court shall, transfer the matter to the High Court; and on such a transfer the proceeding shall be continued in the High Court as if it had been originally commenced by petition to the High Court (s. 39(3)).

To protect the interests of the Crown and the public, the Attorney General must be made a party in every case (s. 39(6)), and the applicant must apply for directions (s. 39(7)) as to what other persons must be given notice of the application so as to enable them to oppose it if they so desire. Care must be taken to have before the court everybody whose interests may be affected [Re A.B.'s Petition (1927) 96 L.J.P. 155]. The court may direct that the whole or any part of the proceedings shall be heard in camera (s. 39(9)). By section 21 of the

Supreme Court of Judicature (Consolidation) Act 1925 [which was in reference to section 188 of the same Act (which is repealed) and it is now to be construed as a reference to the Matrimonial Causes Act 1965, section 39], the court's power is limited to declarations which fall squarely within the terms of section 39. It has been held that there is no power under this section to declare that any person other than the applicant is legitimate (Aldrich v. A-G. (1968) P. 281) or that any person is illegitimate (B. v. A-G. (1967) 1 W.L.R. 776) or that any person other than the applicant or ancestors of his were legitimated. It therefore appears that the jurisdiction of the English court in matters concerning legitimacy by this section is restricted to a person's own legitimacy or, in cases of legitimacy that he, his parents or any remote ancestors became a legitimated person and has certain domicile restrictions.

The decree of the court is binding on the Crown and on all other persons; but if certain persons interested in the decree are not given notice of the application nor made parties to the proceedings, neither they nor their representatives are prejudiced thereby, and the decree is, like other judgment, ineffective (i.e., it does not prejudice any person), if proved to have been obtained by fraud or collusion (s. 39(5), (7)). Thus in order to ensure that the petitioner's legitimacy cannot be questioned in any other proceedings, it is clearly imperative to join as a party anyone who, as a result of possible claims to property might attempt to dispute it later. Furthermore, proceedings for a declaration of legitimacy or legitimation do not affect any final judgment or decree already made by any court of competent jurisdiction (s. 39(8)).

The English Law Commission [Working Paper Number 48 on family law "Declarations in Family Matters" in paragraph 37]

thought that there had not been a case in which a person who had not been notified of legitimation proceedings claimed to be prejudiced by them, and thought that in view of the procedural safeguards in section 39 it is unlikely that an interested party would fail to receive notice. They thought that declarations under section 39 like decrees of nullity and divorce, should operate in rem, in the same way as declarations under Order 15, Rule 16, which will be referred to below. There should be no class of persons against whom the declaration should be ineffective, and the declaration, even if obtained by fraud, should be effective until rescinded. Procedural safeguards should be framed with these effects in view.

2. Declarations Under the Inherent Jurisdictions of the Court

The High Court in addition to its power under the Matrimonial Causes Act 1965, section 39, has claimed and exercised power to make declarations on matrimonial status, using the procedure of R.S.C., Order 15, Rule 16, which provides that:

> No action or other proceeding shall be open to objection on the grounds that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of the right whether or not any consequential relief is or could be claimed.

There is uncertainty as to the type of declaration that can be made under this inherent jurisdiction. Where a declaration under section 39 has built in safeguards, such as giving notice to the interested party, or to the Attorney General, declarations under Order 15, Rule 16, though operating

in rem provide no safeguards other than the discretionary powers of the court. Looking to the cases to discover the nature of the jurisdiction and the declaration that a court can make under this Rule, it has been held that there is no separate power under Order 15, Rule 16, to make a declaration of legitimacy and that such declarations must be made under section 39 of the Matrimonial Causes Act, 1965.[1]

Even though the court does not have any jurisdiction to make declaration of legitimation under this inherent power, the purpose of mentioning it is relevant in discussing the law in Alberta.

II

ALBERTA

Declarations Under the Legitimacy Declarations Act, 1858, 21 and 22 Vict., c. 93

According to the rules governing the reception of the English law into Alberta, Imperial Statutes are only in effect insofar as they have not been repealed, altered, varied, modified, or affected by an Act . . . of the Legislative Assembly.[2] Sections 1 and 2 of the Legitimacy Declarations Act, 1858, which appear in Appendix 2 empowered the court to make the following declarations:

> (1) that the petitioner is the legitimate child of his parents;

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[1] Knowles v. A-G. (1951) P. 54; Aldrich v. A-G. (1968) P. 281.

[2] The Northwest Territories Act, R.S.C. 1970, C. N-22, s. 18, adopted by the Alberta Act (Can.) 4-5 Ed. 7, c. 3, s. 16.

(2) that the marriage of his father and mother was valid;

(3) that the marriage of his grandfather and grandmother was valid;

(4) that the petitioner's marriage was or is valid;

(5) that the petitioner has a right to be deemed a natural born subject of Her Majesty.

Thus in its original form, in relation to legitimacy, it enabled the court to make a declaration that the petitioner is the legitimate child of his parents. In the case of In Re G. (1922) 1 W.W.R. 978 (Alta.) Beck J.A. on page 981 thought that section 2 was similar to the provisions of the Divorce & Matrimonial Causes Act, 1857, under which the Privy Council decided in Board v. Board that the Supreme Court of Alberta had jurisdiction in divorce, acting on the principle that

> This provision (s. 2) corresponds closely to the provisions of the Divorce and Matrimonial Causes Act, 1857 under which, as is well known, the Privy Council decided that this court has jurisdiction to decree divorce, (Board v. Board (1919) 2 W.W.R. 940) on the principle that the substance of the law was introduced into this province by the introduction of the law of England as it stood on July 1, 1870. I am for similar reasons of the opinion that this court has jurisdiction in an appropriate proceeding to declare legitimacy.

He further states on the same page:

> The adjectival law or practice laid down by the Statute is not effective in this jurisdiction where there is a complete system of

> practice with a provision that in default of express explicit rule analogy to our other rules shall be the guide.

However, Stuart J.A. with whom the other members of the court concurred thought the situation might be different from Board v. Board. The Divorce & Matrimonial Causes Act had created a substantive right and the Supreme Court of Alberta, as the only superior court in the province, had jurisdiction to enforce it. The Legitimacy Declarations Act appears not to enact any substantive law as to legitimacy but merely to give jurisdiction to a specific court to declare legitimacy if certain prescribed proceedings are taken and the Supreme Court was not that court. He reserved his opinion for a later case on proper argument.

The Alberta Legislature dealt with this matter in the Domestic Relations Act, R.S.A. 1927, c. 5, s. 56, of that Act, and its final form in section 38 of the Domestic Relations Act, R.S.A. 1955, c. 89, both the sections being attached as Appendix 3. They dealt with substantially the same subject matter and presumably either did away entirely with the Imperial Statute [i.e., The Legitimacy Declaration Act 1858] or put it in abeyance.

However, the Legitimacy Act, R.S.A. 1960, c. 56, s. 8, repealed Part VII of the Domestic Relations Act which included section 38 and the question arises: Are sections 1 and 2 of the Legitimacy Declaration Act, 1858, a dead letter now or does the elimination of Part VII of the Domestic Relations Act revive the jurisdiction of the Alberta courts to make declarations of illegitimacy under the Legitimacy Declarations Act, 1858?

If the Imperial Statute has been revived then it must be noted that the inherent power of the English court [under order

15, Rule 16] has been word by word incorporated into the Judicature Act, R.S.A. 1970, c. 193, s. 32(p) which reads as follows:

> 32.(p) no action or proceeding is open to objections on the ground that a judgment or order sought is declaratory only, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed.

The power under the Legitimacy Declaration Act 1858, overlaps with the power under the Judicature Act and it has been held according to English authorities [Aldrich v. A-G. Knowles & A-G.] the court could only make declaration of legitimacy of the applicant under the Legitimacy Declaration Act 1858 [present section 39 of the Matrimonial Causes Act 1965]. That is, if both Acts are in force, it appears that the Legitimacy Declaration Act prevails.

If the Legitimacy Declaration Act is not in force, then the court may have power under section 32(p) of the Judicature Act to make declarations of legitimacy. The section is without any safeguards other than the discretionary powers of the court and in the long run may prejudice the rights of some parties who were not a party to the proceedings.

Was the Legitimacy Declaration Act, 1858, "repealed, altered, varied, modified or affected by" the Domestic Relations Act. The courts have given a broad interpretation to these words. For example in Quinn v. Beatles (1924) 3 W.W.R. 337, Stuart J.A. [Supreme Court of Alberta, Appellate Division] on page 342 stated:

> I think serious attention should be given to the word 'affected' . . . . It certainly means something other than, 'repealed', 'altered'

> or 'modified' and means, and was intended to mean, something less. We should not assume that the use of the word 'affected' is simple tautology or verbiage.

The question whether the original Imperial Statute revives by a subsequent repealment of the provision repealing it though can logically be answered in the negative but the case law has some confusion. The old rule of law is laid down by Best C.J. in Tottle v. Grimwood 2 Bing. 493 at 496 in the following terms:

> It is the undoubted rule of law that if an Act of Parliament which repeals former statutes be repealed by an Act which contains nothing in it that manifests the intention of the Legislature that the former laws shall continue repealed, the former laws will, by implication, be revived by the repeal of the repealing statute.

That being the rule before Lord Brougham's Act, 13 & 14 Vict., c. 21, s. 5 was enacted stating

> . . . that where any Act repealing, in whole or in part, any former Act is itself repealed, such last repeal shall not revive the Act or provisions before repealed, unless words be added reviving such Act or provisions.

A provision which was enacted to alter the previously existing rule.

It is beyond the scope here to argue whether Lord Brougham's Act is in force in Alberta but it may be pointed out that due to the wording of the section it may be argued that it only applies to cases where an Act has been repealed, not by implication, but in express terms and the repealing Act is afterwards itself repealed.

In Foley v. Webster (1893) 3 B.C.R. 30, by an ordinance passed in 1867, the civil and criminal laws of England as they existed on November 19, 1858, became, as far as applicable, in force in British Columbia.[3] Therefore the statute which gave interest on judgments at the rate of 4 per cent became and continued to be law down to the passing of the Dominion Act which gave interest on judgment at 6 per cent. This Dominion Act was repealed and the new law stated "that whenever interest is payable by agreement of parties or by law, and no rate is fixed by law, the rate of interest shall be 6 per cent". It was held that the 4 per cent rate of interest was "fixed by law" in British Columbia by the Imperial Statute and that 4 per cent was the only amount that can be charged or recovered. Drake J., at page 31, stated:

> The contention that the repeal of secs. 24, 25, 26, 27, and the Rev. Stat. of Canada in fact repealed the right to recover interest at all on judgments is not well founded. These sections did not affect the principle of allowing interest on judgments, but only increased the amount of such interest, and by their repeal the law as it existed in this province was not repealed and still is the law here. The legislature never contemplated

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[3]The English Law Act, R.S.B.C. 1960, c. 129, s. 2

> 2. The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, are in force in all parts of the Province; but the said laws shall be held to be modified and altered by all legislation having the force of law in the Province, or in any former Colony comprised within the geographical limits thereof. R.S. 1948, c. 111, s. 2.

> enacting a new law on the subject of judgments, but only a modification of a part of it which modification having been subsequently repealed, left the old law as it existed.

It is submitted that the above mentioned case deals with the effect of repealing a federal statute on the provincial law which was deriving its power from the Imperial Statute and thus is not a similar fact situation which we are discussing. Moreover the provision of English Act is much narrower in scope than the provision of North West Territory Act.

Taylor C.J. in Re Bremner (1889) 6 Man. L. Rep. 73 at 75.76 while discussing the Debtor's Act stated that when the law of England was introduced in Manitoba by 36 Vict. c. 12, it introduced the Imperial Act 13 and 14 Vic., c. 21, s. 5 (Lord Brougham's Act) which provided that the repeal of an Act repealing another should not revive the first Act. This provision was incorporated into R.S.B.C. 1911, c. 1. The writer is not aware of any such provision existing in Alberta.

In an Australian case Reid v. Fitzgerald (1931) W.N. (N.S.W.) 25 [N.S.W. Supreme Court, Harvey C.J. in Equity], where a section of an Imperial Statute in force in New South Wales by virtue of the Australian Courts Act (9 Geo. IV, c. 83) (Imp.) was replaced by a section in a local Act and the latter was subsequently repealed, Harvey C.J. held that such repeal does not operate to revive the old Imperial Law. It is submitted that this case though with different fact situation clearly answers our question negatively. The High Court of Australia in a later case Hazelwood v. Webber (1934) 52 C.L.R. 268 at 276 on appeal from the Supreme Court of N.S.W., affirmed the above mentioned statement made by Harvey J.

The better view appears to be that the Legitimacy Declaration Act was not revived, but the situation is not entirely clear.

III

NEW ZEALAND

The Status of Children Act 1969, s. 10, reads as follows:

> 10. Declaration as to paternity--
>
> (1) Any person who--
>
> (a) Being a woman, alleges that any named person is the father of her child; or
>
> (b) Alleges that the relationship of father and child exists between himself and any other named person; or
>
> (c) Being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between two named persons,
>
> may apply to the Supreme Court for a declaration of paternity, and if it is proved to the satisfaction of the Court that the relationship exists the Court may make a declaration of paternity whether or not the father or the child or both of them are living or dead.
>
> (2) Where a declaration of paternity under subsection (1) of this section is made after the death of the father of the child, the Court may at the same or any subsequent time make a declaration determining, for the purposes of paragraph (b) of subsection (1) of section 7 of this Act, whether any of the requirements of that paragraph have been satisfied.
>
> (3) The provisions of the Declaratory Judgments Act 1908 shall extend and apply to every application under subsection (1) of this section.
>
> Cf. Matrimonial Causes Act 1950 (U.K.), s. 17(1); 1963, No. 71, s. 8(4).

The provision of section 8(4)[4] which are made expressly subject to section 7(1)[5] make a declaration as to paternity under section 10 by the Supreme Court, conclusive proof for all purposes. Hence it is submitted that such a declaration will operate in rem which by virtue of section 9(3) is officially entered in the Register of Births by the Registrar General.

It may be mentioned here that a paternity order within the meaning of the Domestic Proceedings Act 1868 shall be prima facie evidence of paternity in any subsequent proceeding, whether or not between the same parties,[6] whereas, it shall for the purposes of any application for a maintenance order or any proceedings in respect thereof, be conclusive evidence that the person against whom it is made is the father of the child.[7] The paternity order under the Domestic Proceedings Act 1968 or a declaration of paternity under section 10 of the Status of Children Act 1968 is a prerequisite[8] before the court has power to make a maintenance order.

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[4]Section 8(4) "subject to subsection (1) of section 7 of this Act, a declaration made under section 10 of this Act shall, for all purposes, be conclusive proof of the matters contained in it."

[5]Paternity must have been admitted or established during the lifetime of a deceased father or child before it will be recognized for the purpose of distribution of his estate.

[6]Status of Children Act 1968, s. 8(3).

[7]Domestic Proceedings Act 1968, s. 52.

[8]Domestic Proceedings Act, 1968, s. 38.

IV
AUSTRALIA

Section 92 of the Commonwealth Marriage Act 1961 which appears in Appendix 4 provides for declarations similar to some of those in the Legitimacy Declaration Act. It gives the court power to direct that notice be given to such person as it thinks fit, including the Attorney General; to direct that a person be made a party; and to allow a person having an interest to become a party. The order does not affect the rights of another person (other than the Crown) who was not a party and who did not receive notice, nor does it affect an earlier judgment by a court of competent jurisdiction.

The jurisdiction is invested in the Supreme Courts of the States, on application, to make, in the courts discretion, declarations that the applicant is the legitimate child of his parents, or that he or his parent or child, or a remoter ancestor of descendant is or was a legitimate person. The proceeding is not one inter partes. The subject matter sought to be effected is a matter of status.[9] The onus is on an applicant to prove legitimacy and it must be established beyond reasonable doubt.[10] Legitimacies in accordance with the Act have effect in all the territories of the Commonwealth.[11]

It is submitted that the safeguards in this section are less stringent than those incorporated in section 39 of the Matrimonial Causes Act. As stated earlier the jurisdiction of the English courts under section 39 is restricted

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[9] Re J., (1964) V.R. 601.

[10] Connolly v. Connolly (1966) 9 F.L.R. 218.

[11] Commonwealth Marriage Act 1961, s. 111.

in cases of legitimacy to the applicant, his parents and remoter ancestors, whereas the Australian section 92(b) extends this right to one's child also. Furthermore, though the order made under this section binds the Crown irrespective of the fact whether notice was given to the Attorney General or not whereas under the English law notice to the Attorney General is a prerequisite.

V

SOUTH AFRICA

The following is the reproduction from the book by Spiro E. "Law of Parent and Child", which gives us an outline of the law in South Africa. An outline which is difficult to improve upon in its concise and clear statement of the law.

> In South Africa, although the courts will not lend themselves to deciding merely academic questions or giving advice, they have both at common law and under statute law, power to make declaratory orders, more particularly also in regard to the legitimacy or illegitimacy of a child. Maintenance may be claimed in the usual way.

(2) Determination of Paternity (Affiliation)

(a) Main issue

If nothing else but a declaration on the legitimate or illegitimate status of a child is sought, then paternity is the main issue. The term 'affiliation' which is borrowed from the English law implies the determination of paternity in respect of an illegitimate child.

(b) Ancillary issue

The term 'ancillary issue' is not felicitous in this connection. It is used when more than one issue, differing in importance, are involved and more

particularly so in matrimonial causes. For instance, a prayer that issue should be declared legitimate would be ancillary in nullity proceedings. It is clearly a prayer in its own right, and a decision thereon would be res judicata vis-a-vis the whole world, just as much as a decision on the nullity of the marriage.

(c) Incidental issue

The position is, however, different where paternity is only an incidental issue, for in such a case there would be res judicata in regard to the incidental paternity issue only as between the parties to the proceedings and for the particular purposes of the proceedings. If a natural father is sued only for maintenance, paternity is such an incidental issue.

(3) Evidence

Purporting to follow the Roman-Dutch law, where, however, the procedure was different, the courts still distinguish the case where intercourse is admitted and the case where intercourse is denied. The admission of intercourse is said to create a legal presumption as to paternity, which may, however, be rebutted by the defendant by proving that it was impossible for him to have been the father of the child. Where intercourse is denied, the cases insist on corroboration of the mother's evidence.

However, the Appellate Division twice left the question open whether where there is a denial of relevant intercourse the evidence of the mother still requires corroboration in the present law. Moreover, as has been made clear in unmistakable terms by the Appellate Division whenever an occasion offered, the proof required in civil cases is throughout only one on a balance of probabilities.

It is, therefore, considered that in a civil case paternity need only be proved on a balance of probabailities. In some recent cases where this is admitted, it is, however, said that the court must exercise caution in dealing with an allegation by an unmarried woman that the man whom she names is the father of her child, but it is submitted that the

> regard to such caution falls within the judicial process of ascertaining the preponderance of probabilities, there being no room for any rigid rule.

VI

AFFILIATION PROCEEDINGS

The law relating to affiliation proceedings has been discussed by Mrs. Shone in her research paper. The effect and the main object of the affiliation proceeding is to compel the putative father to contribute to the support of his illegitimate child to prevent the child from becoming a public charge. The support-oriented paternity action is not intended to confer a new "status" on the child. The sole function of the action is to impose a support obligation on the putative father. The order does not constitute any stronger relationship between the father and the child than that of a judgment-debtor-and creditor. Under the provisions for maintenance as laid down in part 2 of the Maintenance and Recovery Act, R.S.A. 1970, c. 223, the obligation to maintain is determined in conjunction with affiliation proceedings. Under this part, the putative father may be identified and rendered civilly liable for the support of his illegitimate child. Yet he acquires no rights in relation to the child. The declaration by an order under this Act is one of the tests of paternity under the Family Relief Act, R.S.A. 1970, c. 134, s. 2(b). Thus, the question of paternity comes in issue only collaterally in the sense that the purpose of the proceedings is to obtain some other object; to compel the putative father to contribute to the support of the illegitimate child. The judgment is not a judgment in rem. The finding will always bind the parties and their privies. The procedure is based on adversary system and the child (though he has a right to initiate proceedings) need not be and is frequently not separately represented.

VII

IN REM; IN PERSONAM

The essential rule of law preventing the retrial of matters which have been determined in a previous case is the doctrine of res judicata. Literally the rule means that the matter has been litigated. It is a rule which precludes parties from relitigating what is substantially the same cause of action. The classification of actions as "in personam" or "in rem" has frequently been employed as a starting point from which to draw a legal conclusion. Halsbury's Laws of England define these terms as follows:

> A judgment in rem may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation.
>
> A judgment in personam determines the rights of the parties inter se to or in the subject matter in dispute whether it be corporeal property or any kind whatever or a liquidated or nonliquidated demand, but does not affect the status of either persons or things, or make any disposition of property, or declare or determine any interest in it except as between the parties litigant. Judgments in personam include all judgments which are not judgments in rem, but, as many judgments in the latter class deal with the status of persons and not of things, the description 'judgments inter partes' is preferable to 'judgments in personam'.

A plea of res judicata can only be founded on a judgment given on the merits, and the court will look behind the formal judgment at the reason for judgment to ascertain whether an action was dismissed as premature or for lack of jurisdiction and not upon the merits (McIntosh v. Parent (1924) 4 D.L.R. 420).

Volume 15 of the Halsbury's Law on page 180 under the sub-heading "Judgments Resembling Judgments in rem" states that a judgment is not a judgment in rem because it has in a suit inter partes, determined an issue concerning the status of a particular person or family.

The question whether the judgment is in rem or in personam under the American law has come up for consideration while deciding the issue of jurisdiction (e.g., is personal service required or is constructive service sufficient?). A state has jurisdiction to entertain an action in person over persons within its territory and to entertain an action in rem with respect to things within its territory. The District Court of Appeal of Florida in T.J.K. v. N.B.; Fla., 237 So. 2d 592 stated:

> . . . the concept of an in rem action has been extended to those actions which seem to affect status, for example, divorce actions, the status being given a situs, i.e., where one of the spouses is domiciled . . . . Bastardy proceedings are purely statutory in nature, and the remedy given by the statute must measure the rights and liabilities of the parties. Certainly the theory that this type of action is an action 'in rem', the child being the 'res', is untenable. It is impossible to sustain an argument that the action is one 'in rem' as there is nothing to effect the interests of persons in a specific thing or res. Is it then the purpose of this action to determine the status of the parties as in divorce cases? And to what extent should we now extend the concept of in rem actions as similarly extended in divorce actions? A judgment of filiation in such cases as this is designed to furnish the basis of a judgment for personal recovery, and it has no other office or function. The primary purpose . . . of the statute is to fix the father's obligations to support and educate his child. This cause of action does not affect the condition or status of the parties in any manner. By such judgment the parental

> relation is not established between the father and the child. The father is not entitled to custody or services of the child. The child does not become his heir and has no claim on him for further than that given by the judgment of the court. In the light of the foregoing, we determine that the action is one 'in personam', ...

This case was followed by J.E.S. v. B.J.F. 240 So. 2d 520 (Fla. 4th Dist. 1971).

In a California case, Hartford v. Superior Court, 304 P. 2d 1 (Cal. 1956),plaintiff brought suit to obtain a declaration that he was defendant's illegitimate son, but disclaimed any desire to enforce personal obligations. Substituted service was made on defendant outside the state. The Supreme Court of California issued a writ of mandamus compelling the trial court to enter an order quashing service. In so doing, it was held that a paternity proceeding is not an action in rem, and that personal jurisdiction over the alleged father is a jurisdictional prerequisite for such a declaration of status. Justice Traynor states:

> . . . plaintiff correctly concedes that if the purpose of the present action were to enforce a duty of support or some other personal obligation growing out of the parent-child relationship, personal jurisdiction over defendant would be essential. . . . This requirement cannot be avoided by limiting the relief sought to a binding adjudication of the parties status, since such an adjudication would prevent relitigation of the basic issue on which defendant's personal obligations to plaintiff must rest and to that extent would necessarily constitute a personal judgment against him.

Questions relating to the legitimacy of a person may, of course, arise in proceedings other than a petition for a declaration of legitimacy under the laws of England, e.g., in a succession case. Long before 1858, and also since, the

courts have decided such questions whenever they have arisen as between the parties to a cause, whether the person whose legitimacy was in question was alive or dead, and whether or not he was a party to the proceedings. But such decisions do not amount to decrees in rem; they do not bind anyone except the parties or those claiming under them, and they do not declare that the person in question is or was legitimate for all purpose, but only for the particular purpose in question (Skinner v. Carter [1948] Ch. 387 at 395-96). Thus in Goodman v. Goodman [1862] 3 Giff., 643 it was held that a person had been legitimated by subsequent marriage and could succeed to property as a child under the will of A; in Re Goodman's Trust (1880) 14 Ch. Div. 619; reversed [1881] 17 Ch. Div. 226 (C.A.), on a different point, it was held that the same person had not been legitimated and could not succeed to other property as one of the next-of-kin of B. In B. v. Attorney General 1965 1 All E.R. 62 (High Court P.D.A. Div.) the question before the court was whether a decree of divorce embodying an order for the custody of children is a judgment in rem, or at least stands on the same footing as a judgment in rem, and consequently binds all the world and conclusively establishes the legitimacy of the children named therein. The facts of the case were: H and W were married in 1917 and executed a Deed of Separation in 1925. The petitioner, C was born 10 months later. In 1927, W presented a petition for divorce and gave evidence on oath that C was his son. The suit was not defended and the decree nisi which was made absolute included an order for custody of C in 1929. In 1936 in the proceedings for maintenance brought by W, H was estopped from denying that C was his child when the fact had been so found by the court and H had allowed it so to find. By a petition in 1962, C prayed for a declaration that he was the legitimate son of H. By their answers the interveners, who included H,

his children, his children from subsequent marriage denied that H was the father of the petitioner C. Willmer L.J. while discussing the provisions of section 17 of the Matrimonial Causes Act, 1950, which is the present section 39 of the Matrimonial Causes Act, 1965, which has been discussed earlier, on page 67 states:

> Having regard to those provisions which Parliament has seen fit to make, it seems to me that it would be strange indeed if a declaration of legitimacy binding in rem (i.e., binding on the world at large) could be spelled out of a mere order for custody, on the making of which the person principally affected was not even heard. For this would mean that the safeguards required by Parliament and embodied in the provisions to which I have just referred, could be evaded, as it were, by a back door. It is common knowledge that in practice, a decree of divorce may embody orders on a number of ancillary matters, e.g., maintenance. It seems to me that it would be absurd to suppose that, because a maintenance order may be embodied in the same document as that which determines the status of the parties, it is therefore to be regarded as an order binding in rem. I do not see why an order for custody should be regarded any differently, i.e., as anything other than an order binding only the parties to the suit. That at least appears to have been the view of Lord Merryman, P., who said in terms C. v. C. [1947] 2 All E.R. at p. 53, in a divorce suit, the welfare of the child is the paramount consideration, the question of custody is an issue between the parents.

Thus to conclude, Paragraph 50 of the paper entitled "The Illegitimate Child in English Law" prepared by the Family Law Reform Sub-Committee states:

> Except in the case of legitimacy petitions brought under section 39 of the Matrimonial

> Causes Act, the question of paternity comes in issues only collaterally in the sense that the purpose of the proceedings is to obtain some other object: a divorce on the grounds of a wife's adultery, the payment of maintenance, property under a will or settlement, and so forth. The judgment is not a judgment in rem. The findings will always bind the parties and their privies. In the case of legitimacy petitions they will also bind the Crown and those to whom notice of the proceedings have been given.

VIII

PROCEEDINGS TO ESTABLISH PATERNITY

The purpose here is not to consider whether the existing classifications of children into legitimate and illegitimate should be abolished or reduce the present distinctions based on illegitimacy, i.e., improving the position of the illegitimate under the present law as all this has been discussed by the Board. The purpose is to give a brief outline of the suggested judicial proceedings to establish paternity by different Law Commissions to enable the Board to make a recommendation as to what should be the method adopted for Alberta.

The Ontario Law Commission has taken the view that the status of illegitimacy ought to be abolished in Ontario, and that so far as it is consistent with the interest of the child born outside marriage, his position under the law ought to be equated with that of other children. The Commission is of the opinion that the present Affiliation Proceedings does not bind any person but the parties to it and does not serve as a judicial finding of paternity for any other purpose but holding the father responsible for monetary payments. Since the issue in all the situations (except The Quieting Titles Act, R.S.O. 1970, c. 396, s. 30) falls to be determined only collaterally, the judgment is

not a judgment in rem.

The Ontario Law Reform Commission's 'Report on Family Law' Part III, 'Children' on page 18 states the view of the Commissioners:

> In view of our recommendation that the concept of legitimacy give way to the concept of paternity as a means of establishing rights and duties between father and child, it becomes important for the question of paternity to be determined in proceedings in which a judgment similar to a declaratory judgment may be obtained. We are also of the view that it is regrettable that the question of paternity is always open for re-litigation between different parties. . . .

They reject a single form of proceedings which would lead to an in rem judgment notwithstanding their view that this would be the "ideal solution to the problem of multiple litigation over paternity" (p. 19). As an alternative they propose that (p. 20):

> Whenever a judicial decree of paternity is made whether it is made in proceedings in which an immediate right involving the issue of paternity is being asserted, or whether the decree is purely declaratory, obtained for the purpose of securing a future right, then this decree will operate as a presumption that the man named in the decree is the father for all other purposes. Since the decree would be only a presumption it would be open to rebuttal.

A confidential Working Report of the Law Reform Division entitled "Study of Children Born Outside Marriage; Their Rights and Obligations and the Rights and Obligations of Their Parents" of New Brunswick is of the opinion that law

in New Brunswick should be reformed to abandon as far as possible the legal distinction that is presently drawn between legitimate and illegitimate children. It is stated on page 95

> There should be legislation to effect a broad declaration of the status of children; this legislation should specify that in those cases where the natural parents of the child are established, the child shall be treated for all legal purposes as the child of those parents, and that where the word "child" or a similar term is used in a statute or document in a manner that is intended to describe a relationship between the child and his parents, the word shall be deemed to have reference to his natural parents, whether or not the parents are married to one another. . . . The affiliation proceedings, as it presently exists . . . should be abolished. In its place there should be provision for the establishment of paternity in one of two ways:
>
> (i) an acknowledgement procedure whereby an unmarried man and woman can through an administrative procedure acknowledge a child to be their child.
>
> (ii) A judicial procedure whereby either the mother, the child or the father may seek a declaration as to his paternity of a child . . . . The burden of proof should be based upon the normal civil standard.

The report is silent as to what kind of decree may be granted by the court and whether it will operate in rem or in personam.

England has taken the traditional approach of improving the position of the illegitimate child under the present law. A significant change has been made there in the laws of intestate succession.

In the paper entitled "The Illegitimate Child in English Law" prepared by the Family Law Reform Sub-Commission the Society of Public Teachers of Law has stated the desirability of the introduction of a rule that,

> . . . whenever paternity is contested, it should be tried in separate proceedings and the findings should be embodied in a decree which would be a judgment in rem. They term the proceedings as 'paternity proceedings' and the decree as a 'paternity decree'. A man adjudged to be the father would be termed the 'decreed father'.

The following paragraphs have been reproduced from the above mentioned paper to give a broader idea about the kind of approach the Commission has recommended.

54. Notice of Proceedings. If the proceedings are to be based on the adversary system, interested persons who should be joined as parties (or at least given notice of the proceedings) are the alleged father, the mother, her husband (if she is married), and any other man who, it is averred, might be the father. Ideally, the child always ought to be separately represented by a guardian ad litem, whose functions would be similar to those mentioned in the last paragraph. Apart from the question of costs, this seems unnecessary if the issue is a simple one and separate representation is unlikely to help the court, as would happen, for example, if the sole question was whether the mother's husband or another named man was the father. The best practical solution is probably to leave the court free to order that the child should be separately represented if the case indicates that this is desirable, as happens in divorce proceedings now (although we feel that the power should be exercised more frequently than it is at present).

55. How far others should be joined or given notice must depend upon the nature and effects of the decree. We have already indicated in paragraph 51 that we

should like the decree to be a judgment *in rem*. We appreciate, however, that this would give rise to enormous difficulties in practice. The inconvenience caused by any other solution is outlined in paragraph 50 (ii). A choice must be made between the following

(a) The decree should be a judgment *in rem* subject only to the court's power to rescind it in the circumstances to be mentioned in paragraph 56. As the existence of a decree might affect the devolution of property, it seems to us to follow inescapably that all those whose interests might be affected must be given the opportunity of intervening in the proceedings. Even if some or all of them were to be jointly represented, this would produce complexity, delay and expense. If a woman is seeking maintenance on behalf of her child from the alleged father, it is in the highest degree impracticable to expect her to give notice of the proceedings to his wife and children, or perhaps his parents or grandparents and their issue, or even strangers with a contingent interest in property if the father dies without issue. Not only would she be unable to identify them all, but the man might well be blackmailed into compromising a completely groundless claim as the only means of preventing the details of a brief liaison from being published to all members of his family.

(b) The decree should be a judgment *in rem* but those whose interests in property are affected by it and who have not been given notice of the proceedings (or joined as parties) should be able to re-open the issue. This has two major disadvantages. First, it would defeat the prupose of a judgment *in rem*. Secondly, in order to prevent a multiplicity of actions by those with contingent interests, the question would be relitigated only when an interest vested and consequently might have to be reopened years later when the mother, alleged father and perhaps the child might all be dead.

Ideally, we have no doubt that (a) is the right solution. Bearing in mind, however, that most proceedings would doubtless be for relatively small maintenance claims, practical considerations would probably compel one to accept (b).

56. If a paternity decree is to be a judgment in rem, normally it should be irreversible once pronounced unless appealed against in the usual way. On the other hand, however, it would be equally unfair to saddle an innocent party with the consequences of a decree which had, for example, been improperly obtained by fraud. As a compromise, it is suggested that a decree should be final unless appealed against but that the court should be empowered to rescind it on the production of fresh evidence or if it is shown that it has been obtained by fraud or in circumstances amounting to a denial of substantial justice. Rescission proceedings should be brought only with the leave of the court which should not be given if the party could reasonably have been expected to raise the objection relied on when the paternity proceedings were brought. If a decree were rescinded, power would have to be given to vary any settlement entered into on the strength of it, but it should not be possible to upset concluded transactions in any event.

The civil standard of proof is required for the above mentioned paternity proceedings and the committee see no reason for retaining different rules of procedure and evidence which now distinguish affiliation proceedings from all others. The proceedings would normally be commenced in order to enable the application to aasert some other right, e.g., custody, maintenance or property. A child would be regarded as a "fatherless child" for the purpose of any proceedings in which paternity was relevant if there was no acknowledgement enrolled or decreed father declared.

The position of New Zealand has been discussed earlier.

Krause in his book "Illegitimacy" Law and Social Policy" in order to find the best pattern for the legislation turns to legal comparisons with some of the European countries and although presents convincing reasons for his legislative proposals they appear to be one sided point of view. What he suggests in short is that the paternity action should be civil and the indigent parties should be provided with adequate, free counsel in all cases of disputed paternity which in the present day society can be achieved by legal aid programs (P. 111, 112) and the action should be deferred until after the child's birth (P. 118). Appropriate child welfare authorities should undertake to establish paternity of any child whose paternity has not been established, unless circumstances indicate that ascertainment of its paternity would not be in the best interest of the child (P. 115); there should be an informal pretrial hearing before a 'referee' the purpose of which is to collect evidence. On the basis of his review of the evidence the referee would recommend (a) that the father acknowledge the child, (b) that the parties compromise, (c) that the action be dismissed. Only if the recommendation is unacceptable to either party shall the matter be set for trial (P. 116). Since the child's interest in having his paternity ascertained would be safeguarded by appropriate child welfare authorities, a statute of limitation should require the paternity action to be brought within a reasonable time after the child's birth (P. 118).

The uncooperative mother should be subject to the same compulsions and sanctions governing the reluctant witness in other types of civil action (P. 121).

The paternity judgment is to be viewed as a 'status' judgment establishing the child's status vis-a-vis its father for all purposes, against all parties and for all time but only where this would be in the best interest of the child. Where this would not be in the best interest of the child, the paternity action would be limited to the imposition of a specific support burden possibly coupled with inheritance rights, without affecting other aspects of the father-child relationship.

New Brunswick's report rejects the proposal of state interference since it would require an administrative and investigatory staff that would be charged with the duty to probe into areas that many would regard as private. Thus the report states on page 41: ". . . it is not recommended at this time that any public administration be set up for the purpose of ascertaining paternity. . . ."

IX

CONCLUSION

The following policy questions arise from the above text:

1. Should there be a procedure to establish responsibility for support only?

   (1) Arguments for:

      (i) Assuming that it is desirable to make provision for obtaining support payments at all, it may be argued that an elaborate procedure which would involve bringing in everyone with a possible interest, and providing for the putting forward of those interests and litigating them thoroughly, would be likely to increase cost and delay, and might defeat the purpose.

(ii) All these safeguards are not necessary if the only effect is to require an alleged father to pay support. The only interest adversely affected is his own.

(2) Arguments against:

(i) Disrespect for the law will be encouraged if a decision is made one way on an application for support, and on another way in another proceeding in a higher court. The considerations that apply to Hollington v. Hewthorn apply here.

(ii) It is not in the interest of the child to be told that he has one father one day and another father later.

2. Should there be a proceeding for a declaration of paternity which will be good in all circumstances, at all times, and against all people?

(1) Arguments for:

(i) The matter of paternity should be settled once and for all under appropriate legal safeguards.

(ii) The courts decide matters of equal importance by the same procedure and we stand by the result.

(2) Arguments against:

(i) Due to the laws of succession, and particularly if an illegitimate becomes able to claim through his father, the rights of many people will be affected, and some of them may not have received notice, or if they did receive notice there was no reason for them to think at that time that the matter affected them, and indeed they may not have existed. (Much of this can be got around by saying that those who do not get notice are not affected, but see the arguments below.)

(ii) If a judgment is obtained by fraud it should not be allowed to stand. (This can be got around by an exception for fraud. See below.)

(iii) Evidence may turn up which was not avilable, and in some cases could not have been made available, at the original hearing. While it may not be wrong to deny a sloppy plaintiff the right to upset a judgment when fresh evidence comes in, it may be wrong to deny that right to an illegitimate who was unable to produce such evidence.

3. If there is to be a judgment in rem, should it affect those who did not receive notice?

(1) Arguments for:

(i) These are the arguments in favour of the judgment in rem.

(2) Arguments against:

(i) It is not fair to bind those who had no chance to challenge the finding. For example, a 19 year old with no property might not contest proceedings against him, but the result of an in rem finding might be to give the child 30 years later a right to claim in the estate of the father of the 19 year old as against other beneficiaries who were not in existence at the time.

4. Should the declaration have force notwithstanding that it was obtained by fraud?

(1) Arguments for:

(i) These are the arguments in favour of the judgment in rem.

(2) Arguments against:

(i) These are obvious.

(NOTE: If there is an exception for fraud, what effect does the declaration have before it is set aside?)

5. Should the declaration remain binding notwithstanding the production of fresh evidence?

APPENDIX I

Section 39 of the Matrimonial Causes Act, 1965.

39. Declarations of legitimacy, etc.

(1) Any person who is a British subject, or whose right to be deemed a British subject depends wholly or in part on his legitimacy or on the validity of any marriage, may, if he is domiciled in England or Northern Ireland or claims any real or personal estate situate in England, apply by petition to the court for a decree declaring that he is the legitimate child of his parents, or that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage or that his own marriage was a valid marriage.

(2) Any person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may apply by petition to the court, or may apply to a county court in the manner prescribed by county court rules, for a decree declaring that he or his parent or remoter ancestor, as the case may be, became or has become a legitimated person.

In this subsection "legitimated person" means a person legitimated by the Legitimacy Act 1926, and includes a person recognised under section 8 of that Act as legitimated.

(3) Where an application under the last foregoing subsection is made to a county court, the county court, if it considers that the case is one which owing to the value of the property involved or otherwise ought to be dealt with by the High Court, may, and if so ordered by the High Court shall, transfer the matter to the High Court; and on such a transfer the proceedings shall be continued in the High Court as if it had been originally commenced by petition to the court.

(4) Any person who is domiciled in England or Northern Ireland or claims any real or personal estate situate in England may apply to the court for a decree declaring his right to be deemed a British subject.

(5) Applications to the court (but not to a county court) under the foregoing provisions of this section may be included in the same petition, and on any application under the foregoing provisions of this section (including an application to a county court) the court or the county court shall make such decree as it thinks just, and the decree shall be binding on Her Majesty and all other persons whatsoever, so however that the decree shall not prejudice any person--

(a) if it is subsequently proved to have been obtained by fraud or collusion; or

(b) unless that person has been given notice of the application in the manner prescribed by rules of court or made a party to the proceedings or claims through a person so given notice or made a party.

(6) A copy of every application under this section and of any affidavit accompanying it shall be delivered to the Attorney-General at least one month before the application is made, and the Attorney-General shall be a respondent on the hearing of the application and on any subsequent proceedings relating thereto.

(7) Where any application is made under this section, such persons as the court or county court thinks fit shall, subject to rules of court, be given notice of the application in the manner prescribed by rules of court, and any such persons may be permitted to become parties to the proceedings and to oppose the application.

(8) No proceedings under this section shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction.

[(9) The court (including a county court) by which any proceedings under this section are heard may direct that the whole or any part of the proceedings shall be heard in camera, and an application for a direction under this subsection shall be heard in camera unless the court otherwise directs.]

APPENDIX II

1. Any natural-born subject of the Queen or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the court for divorce and matrimonial causes, praying the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid may in like manner apply to such court for a decree declaring that his marriage was or is a valid marriage, and such court shall have jurisdiction to hear and determine such application and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as the court may seem just; and such decree, except as hereinafter mentioned, shall be binding to all intents and purposes on Her Majesty and on all persons whomsoever.

2. Any person, being so domiciled or claiming as aforesaid, may apply by petition to the said court for a decree declaratory of his right to be deemed a natural-born subject of Her Majesty, and the said court shall have jurisdiction to hear and determine such application, and to make such decree thereon as to the court may seem just, and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the court shall, except as hereinafter mentioned, be valid and binding to all intents and purposes upon Her Majesty and all persons whomsoever.

APPENDIX III

Domestic Relations Act, R.S.A. 1927, c. 5, s. 56

56. Any natural born British subject, or any person whose right to be deemed a natural born British subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in Alberta and claiming any property situate in Alberta, may apply by petition to a judge of the Supreme Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage, or for a decree declaring either of the matters aforesaid.

Domestic Relations Act, R.S.A. 1955, c. 89, s. 38

38.(1) Any person domiciled in Alberta and claiming any property situate in Alberta, and being

(a) a natural born British subject, or

(b) a person whose right to be deemed a natural born British subject depends wholly or in part on his legitimacy or on the validity of a marriage, may apply by petition to a judge of the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage, or for a decree declaring either of the matters aforesaid.

(2) The petition shall be accompanied by such affidavit verifying the petition and verifying the absence of collusion as the Supreme Court may by any general rule direct.

APPENDIX IV

Section 92 of the Commonwealth Marriage Act 1961

92.(1) A person may apply to the Supreme Court of a State or Territory for an order declaring--

(a) that he is the legitimate child of his parents; or

(b) that he or his parent or child or a remoter ancestor or descendant is or was a legitimated person,

and the Court may, in its discretion, make the order.

(2) The Supreme Court of each State is invested with federal jurisdiction, and jurisdiction is conferred on the Supreme Court of each Territory, to hear and determine applications under this section.

(3) The jurisdiction with which the Supreme Court of a State is invested by this section is subject to the conditions and restrictions specified in sub-section (2) of section thirty-nine of the Judiciary Act 1903-1960 so far as they are applicable.

(4) The Court to which an application under this section is made may--

(a) direct that notice of the application be given to such persons (who may include the Attorney-General of the Commonwealth or the Attorney-General of a State) as the Court thinks fit;

(b) direct that a person be made a party to the application; or

(c) permit a person having an interest in the matter to intervene in, and become a party to, the proceedings.

(5) Where the Court makes an order upon the application, it may include in the order such particulars in relation to the legitimacy or legitimation of the person to whom it relates as the Court finds to be established.

(6) An order made under this section binds the Crown in right of the Commonwealth or of a State, whether or not notice was given to the Attorney-General of the Commonwealth or of that State, but does not affect--

(a) the rights of another person unless that other person was--

(i) a party to the proceedings for the order or a person claiming through such a party; or

(ii) a person to whom notice of the application for the order was given or a person claiming through such a person; or

(b) an earlier judgment, order or decree of a court of competent jurisdiction, whether in exercise of federal jurisdiction or not.