KERR v. MARTIN (*a*).

Held in the Court of Session in Scotland by a majority of seven to six, that if the mother of a bastard, instead of marrying the father of the bastard, marries another man who dies,—she can afterwards, by marrying the father of the bastard, render the bastard legitimate.

THE facts of this singular case were the following :—

In 1780, Mary Bone, an unmarried woman, was delivered of a female child, named Agnes; of whom John Kerr, an unmarried man, was the putative father.

In 1781, Mary Bone married John Taylor, to whom she had several children. Taylor died in 1793.

In 1794, Mary Bone married Kerr aforesaid; whereupon the question arose whether the child, Agnes, was, or was not, legitimate? and, if legitimate, from what period?

ARGUED FOR THE LEGITIMACY.

It was the general and acknowledged rule of law, that a child, though born before the marriage of its parents, was rendered legitimate by their subsequent marriage.

The alleged exception was the intervening marriage, but on examination it would appear that there was no legal principle, and no authority for this exception.

(*a*) Cited by Lord St. Leonards, *suprà*, p. 641. This case is abridged from the Sec. Ser., vol. ii., p. 764.

It was admitted, that the mere lapse of time between the birth of Agnes and the marriage with Kerr would not of itself have prevented legitimation from taking place.

It was also undeniable, that though the marriage with Taylor was an effectual bar while it existed, it was at an end before 1794, and Mary Bone was just as free to contract marriage with Kerr at that time, as she was before her marriage with Taylor.

The onus was upon the other side to show that there was any rule or principle affecting such marriage, with partial disability so as to deprive it of the usual power of legitimating the previous issue of the parents.

The only principle which could be pointed out was the *fictio juris* which various writers had adopted, that legitimation *per subsequens matrimonium* operated only by carrying back the marriage to a period antecedent to the conception and birth of the child; from which assumption these writers deduced the corollary that the interposition of a mid-impediment was exclusive of the power of legitimating such child by the marriage.

But this fiction could not be allowed to operate to the serious effect of depriving the child of her status of legitimacy, unless it could be clearly proved to be well-founded in point of authority, which, however, was wholly wanting.

Even if the fiction could be established to exist as a legal doctrine, it would not necessarily follow that legitimation was to be excluded. Various answers might still be made; and, in any view, it would not be a more violent fiction to hold (contrary to the fact) that the birth of a legitimate child was as late as the actual marriage of the parents, and so satisfy the alleged requisites of the law, than would be the opposite and

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alternative fiction to hold (equally contrary to the fact) that the actual marriage of the parents was as early as the birth of the child.

It was not upon the basis of any *fictio juris*, but upon much more solid and substantial grounds that the rules for bestowing legitimation were adopted; and there was no need to resort to any fiction, because the law had the power expressly and directly to bestow the legitimation as a consequence of the subsequent marriage, if it saw cause in sound policy to do so, without resorting to the aid of any fiction whatever.

And on examining the history and development of legitimation *per subsequens matrimonium* in the Roman law, it appeared that the true import of the provisions of that law was to include bastards born before lawful children, among those who might be legitimated by subsequent marriage.

By the Canon law, nothing was required for the legitimation of bastards but filiation and marriage, provided that the original connexion of the parents, out of which the child was born, was not adulterous or incestuous, and that they were free to marry when the marriage took place. Such was the doctrine of the great body of commentators, both on the Civil and Canon law.

In regard to the writers on the law of Scotland, all those of authority who had given express opinions, or indications of opinion, on the subject, were in favour of the legitimation; and the only writer expressly against it was Commissary Wallace, whose work was not of recognised authority; and, in this very particular, was scarcely consistent with itself.

And this weight of authority was supported by the consideration, that the whole reasons which could induce a state, on grounds of public policy, to give its

sanction to the legitimation of children by the subsequent marriage of their parents, and to adopt that rule into its municipal law, appeared to operate as fully in a case like the present, as in every other where the original connexion of the parents was not marked by any deeper or more indelible offence than that of fornication, which last it was one main object of the law to remedy.

The present case was not perplexed with any question, whether a child, when legitimated, should possess the rights of primogeniture in competition with the issue of the intervening marriage; because it was only an inheritance through Kerr that was concerned, and he had been only once married. But were such a question to arise, it seemed to admit of a satisfactory solution on the principle, that as it was only a lawful child which could inherit, and as the issue of the intervening marriage was lawful from the date of the birth, while the child subsequently legitimated was not a lawful child until a later date, such child was truly junior, in every question of inheritance, to the issue of the intervening marriage.

ARGUED AGAINST THE LEGITIMACY.

In the ordinary sense of the term, a lawful child was distinguished from one that was illegitimate, precisely in this respect, that the first was the fruit of lawful wedlock, and the last was not. But undoubtedly, by the law of Scotland, the rule of legitimation *per subsequens matrimonium* was acknowledged to exist; and the question was, what were the limits to the application of this rule. It was confessedly subject to some limitations; for instance, children born in adultery could not at any time be legitimated by the subsequent marriage of their parents. The question thus arose, what were the limitations of the rule?

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These were to be gathered from the consuetudinary law of Scotland. Much useful light might be derived from the Civil and Canon law in conducting the enquiry, but it was necessarily to be determined ultimately by the consuetudinary law of Scotland alone.

On looking to the Roman law, it appeared not only that there was no express constitution anywhere to be found, declaring that legitimation should take place notwithstanding an intervening marriage, but that the whole provisions in favour of legitimation were of a limited and qualified kind.

One important limitation of the law was its application only to the offspring of concubinage, it being the object of the Christian Emperors to introduce a reformation into the state of manners, by inducing men to convert concubinage into matrimony.

But there were numerous other limitations of the applications of the rule, all indicating that care had been taken to avoid any general or universal provision for the legitimation of all previous issue *per subsequens matrimonium*. And in the constitution of Zeno, according to one construction of the words, there was room for contending that legitimation was expressly excluded where there was an intervening marriage. It also appeared from the language of the constitutions, as well as from that of the commentators, that a continuity of connexion between the birth of the child and the subsequent marriage was viewed as an element in pointing out those marriages which had the virtue of legitimating previous issue.

On looking to the Canon law, which, in a great measure, adopted the Civil law, it was important farther to observe, that among the jurists the prevalent explanation of the rule in question was, that a subsequent marriage legitimated previous issue by being held,

fictione juris, to draw back to the conception and birth of the child. This was considered to satisfy the necessary requirement of the law, by holding the child (*fictione*) to have been actually born in wedlock. It was true that this fiction, or, as other writers held it, presumption of law, might originally have no better foundation than the authority of the numerous eminent jurists who relied on it. But even in that light it was very important, as it amounted to a positive and general testimony, that, according to their understanding of what the law was, there could be no legitimation where there was the mid-impediment of an intervening marriage.

In regard to the municipal law of Scotland, which was the only law to be ultimately appealed to, there was no decision, and no practice. This fact seemed of itself to be conclusive in a question of consuetudinary law; especially as there were cases without number where the rule of legitimation *per subsequens matrimonium* had come into operation, its effect being undoubted whenever no mid-impediment, such as an intervening marriage, existed.

The weight of authority among writers on the Scots law preponderated in favour of illegitimacy. And there were decisions which, not merely from the judicial dicta delivered at pronouncing them, but from their own inherent tendency and implied principles, pointed at a retroaction of the marriage to the child's birth and conception, as the view which was taken of legitimation *per subsequens matrimonium.*

If the argument on the other side were sustained, it would lead to novel and anomalous results; and even those jurists who speculatively supported it were not agreed among themselves, whether the child, legitimated by a subsequent marriage, was to be held senior or junior, when competing in questions of succession

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with the children of an intervening marriage. And it seemed difficult to avoid the consequence of holding such child to be senior in law, as well as in fact, so soon as he became legitimate; whereby the rights of the issue of an intervening marriage would be materially impaired.

The *Lord Ordinary* (*a*) decided in favour of the legitimacy, but without distinctly specifying from what period it commenced.

This decision was carried to the Inner House of the Court of Session for review; and there, on account of the gravity of the question, all the Judges were consulted. The result was, that the *Lord President* (*Hope*), the *Lord Justice-Clerk* (*Boyle*), and Lords *Glenlee*, *Meadowbank*, *Medwyn*, and *Moncreiff* thought the *Lord Ordinary* wrong; while Lords *Jeffrey*, *Cockburn*, *Murray*, *Mackenzie*, *Gillies*, and *Fullerton*, substantially agreed with him. So that the judgment of Lord *Cuninghame* was confirmed by the scanty majority of seven to six—the minority including not only the two Heads of the Court, but the great legal name of Lord *Moncreiff*.

The opinions of the Judges, singularly learned and copious, will be found at length in the Second Series of the Court of Session Cases (*b*).

The decision of the Court of Session in this case of *Kerr* v. *Martin* was not appealed against to the House of Lords; but its importance (exceeding, it is submitted, that of *Doe* v. *Vardell*) and the light which it throws on *Shedden* v. *Patrick* seem to justify, if not require, its introduction here.

According to the learned *Dean of Faculty's* argument in *Shedden* v. *Patrick* (*c*), the child was for six years a bastard, and without a father. It then became legiti-

(*a*) Lord Cuninghame. (*b*) Vol. ii., p. 764. (*c*) *Suprà*, p. 606.

mate by legal transmutation, and by the same operation its putative father was converted into a real one (*a*).

(*a*) The above remark is addressed exclusively to English lawyers, who may not at once see the working of *Kerr* v. *Martin*. English parties may be affected. Thus where an English Lady marries a Scotch Laird, and the issue are *daughters* only,—if the husband survive, he may (after the fashion of Mr. Shedden) by verbal declaration on his death-bed—marry the mother of an illegitimate *son* aforeborn, who will cut out the offspring begotten in holy wedlock. It is true the same result may ensue from any second or after marriage by the husband. But, in the case supposed, the mother and the progeny being both ready and at hand, might, and probably would, resort to importunities and clamour fatal to the peace of families, and humiliating to relatives, even though unsuccessful. *Kerr* v. *Martin* is an abstruse case, having a wide operation. For this reason I presume to direct attention to it. The Law Peers gave no opinion about it, though Sir Fitzroy Kelly expressed a strong one, arguendo.