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policy could at least be in harmony with the judicial tendency favoring the coal industry. Viewing the problem from the angle of the interest of the state as a whole, these rules are eminently proper: they will accomplish the purpose intended, namely, further development of the oil and gas industry to the deeper producing sands.

R. B. G.

THE SCOPE OF WEST VIRGINIA LEGITIMATIZING STATUTES

At common law only those children born or conceived in lawful wedlock are legitimate¹ and under early common law the illegitimate child had no right of support, of inheritance or even of a name.² Legislators have done much to alleviate the condition of illegitimate offspring, by enacting statutes declaring the child to be legitimate and statutes conferring rights of inheritance upon him. These statutes based on natural justice and on the natural affections of the human heart have radically altered the position of these unfortunate and brought American law into substantial conformity with the Civil and Canon Law.³

Virginia was among the first states to enact legislation designed to mitigate the harsh rules of the common law. In 1776 the General Assembly appointed a Committee of Revisors⁴ to prepare changes in the existing legal system and to Thomas Jefferson⁵ fell the task of drafting the Law of Descents. The Revisors' Report was sub-

¹Including W. Va. Rev. Code (Michie, 1937) c. 42, art. 1, § 5, which does not legitimate but gives rights of inheritance through the mother.
²Vernier, American Family Laws (1936) 148; Madden, Persons & Domestic Relations (1831) 348; Robbins and Deak, Familial Property Rights of Illegitimate Children: A Comparative Study (1930) 30 col. L. Rev. 348.
³See Madden, op. cit. supra n. 1, at 348; Robbins and Deak, supra note 1, at 310; Note (1932) 45 Harv. L. Rev. 778.
⁵9 Hen. Stat. (1821) 175 (Thomas Jefferson, Edmund Pendleton, George Wythe, George Mason, and Thomas Ludwell Lee were appointed on this committee but only the first three named participated in the actual work). See 1 Writings of Thomas Jefferson (Mem. ed. 1903) 52-57.
⁶2 Writings of Thomas Jefferson (Ford's ed. 1803) 195; 1 Writings of Thomas Jefferson (Mem. ed. 1903) 461; Davis v. Rowe, 6 Rand. 355, 373 (Va. 1828).
mitted in 1779 but nothing was done in this respect until 1785, when Jefferson's bill dealing with descent was enacted into law. It included radical changes as to the rights of illegitimates as to intestate succession. With a few minor changes these statutes have been carried into our West Virginia Code, which provides:

"Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, as if lawfully begotten."

"If a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, shall be deemed legitimate."

"The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."

An interesting problem as to the scope of these sections has been raised by *quaere* in the recent West Virginia case of *Pickens v. O'Hara*. In that case T, the testator, by will established a spendthrift trust for his son A for life, and after A's death the principal was to go "to any children he may have surviving him." If A left no children the property was to go to the children of T's daughters, X and Y. After the death of A, plaintiffs filed suit claiming the trust property as legatees and devisees under the will of T, alleging that they were "children" born of a common-law marriage between A and B. It had been previously decided by our court that the children of a common-law marriage are "the issue of a marriage deemed null in law" and so entitled to "inherit" from and through their parents; but this was the first

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6 2 Writings of Thomas Jefferson (Ford's ed. 1893) 195; Report of Committee of Revisors (1784). (For some reason the Assembly neglected the Report of the Revisors for some years; but finally in 1784 Madison succeeded in getting 500 copies of it printed. These copies are now very rare.)
7 12 Hen. Stat. 138, 139 (1823); Davis v. Rowe, 6 Rand. 355, 372 (Va. 1838); Luther v. Luther, 195 S. E. 594 (W. Va. 1938).
8 Davis v. Rowe, Garland v. Harrison, both supra n. 3; Luther v. Luther, 195 S. E. 594 (W. Va. 1938).
10 Id. at c. 42, art. 1, § 6 (under the original Virginia statute, recognition of the child by the father was necessary and this was true in West Virginia until the W. Va. Rev. Code (1931). See Revisors' note to this section.)
11 Id. at c. 42, art. 1, § 7.
12 Syl. 6, 200 S. E. 746 (W. Va. 1938) (Opinion published 200 S. E. 47 was withdrawn by order of the court).
13 The original trust property had been taken by the state of West Virginia by a condemnation proceeding and this suit was to determine the right to the proceeds of the condemnation and the proceeds from oil and gas leases.
14 Warren v. Prescott, 84 Me. 483, 24 Atl. 945 (1892); Lyon v. Lyon, 88 Me. 395, 54 Atl. 180 (1898) (to inherit is to take as an heir at law, by descent or distribution).
15 Luther v. Luther, 195 S. E. 594 (W. Va. 1938); Fout v. Hanlin, 113
time that such issue had sought to assert a claim under a "will" by virtue of the statute. The court decided the case on the ground that no common-law marriage had been proved. The quare was added as to whether, even if the marriage had been proved, the plaintiffs would have been entitled to take under the testamentary gift to "children". Thus the question is presented whether the statutes set out above, apply merely to "descent" or whether they extend to give rights under a will.

As noted above, historically, these statutes were enacted as part of the laws of descent and distribution to provide for succession in the case of intestacy. The purpose was to bestow the property of the alleged familial unit on legitimated offspring. The old Virginia decision of Stones v. Keeling has indicated the precise scope and purpose of the statutes:

"The act of 1785, it should be remembered, relates to the disposition of property only; and proceeds to shew who shall be admitted to share the property of a person dying intestate, notwithstanding any former legal bar to a succession thereto. And, in that light, the law ought to receive the most liberal construction; it being evidently the design . . . to establish the most liberal and extensive rules of succession to estates, in favour of all, in whose favour the intestate himself, had he made a will, might have been supposed to be influenced."

Again in the case of Garland v. Harrison the Virginia court said:

"Our statute of descents is supposed to have been founded on the natural affections . . . It takes men as it finds them; and in default of their providing by last will and testament for a division of their estates, it makes such a division amongst those who are near and dear to the intestate, as he would probably make if he were to make a will according to the dictates of nature."

Some doubt is cast on this construction by the case of Bennett v. Toler in which there was a devise to a daughter for life and on her death the property was to be equally divided among her "children". It was there held that an illegitimate child would

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5 Cell 143, 144 (Va. 1804). Italics supplied.

8 Leigh 368 (Va. 1837). Italics supplied. See also Davis v. Rowe, 6 Rand. 355 (Va. 1828).

15 Gratt. 588 (Va. 1860).
take with legitimates by virtue of the statute permitting bastards to inherit from their mother.\(^5\) The court recognized the rule that the intent of the testator is the polestar of the interpretation of a will\(^6\) but thought that the testator must be held to have intended to include the illegitimate in view of the statute. A dictum shows that the court considers that a fortiori the illegitimate would take under a will in those instances in which the statutes\(^2\) provide he shall be "legitimate". Thus, though originally a statute of descents and distributions, it has seemingly been extended by judicial construction to permit those falling within its provisions to take under a devise or bequest.

The authorities outside the Virginias apparently divide depending on the type of statute involved. If the statute merely gives the bastard "some right of inheritance" as did the statute involved in the Toler case, a majority of courts refuse to say that such legislation affects the construction of wills\(^2\) and this is the sounder view.\(^2\) This type of statute gives merely the right to "inherit" and has absolutely nothing to do with testate property. Those who claim under a will claim not as heirs, or by descent but by purchase as devisees or legatees and unless they can bring themselves within the provision of the will they should not take. In view of the history and purpose of these statutes it seems clear that the statute alone should not be enough to bring them within the class of "children". Where the statute declares the child to be "legitimate" most courts adopting a so-called liberal attitude have extended the statute to the interpretation of wills.\(^2\) This has been done although the statutes were enacted as statutes of

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\(^6\) Smith v. Bell, 31 U. S. 68, 8 L. Ed. 322 (1832); Runyon v. Mills, 86 W. Va. 358, 10 S. E. 112 (1920); 1 PAGE, WILLS (2d ed. 1928) § 808.

\(^7\) The decision can be rested on the fact that the daughter's illegitimate child was known to the testator. His intent thus reasonably intended the child.


\(^2\) Note (1932) 45 Hanz. L. Rev. 890.

descent. The courts following the prevailing view do so on the ground that there are no classes or degrees of legitimacy and if the bastard is made "legitimate" he is legitimate for all purposes. However, these attempts to construe and interpret wills in terms of descent statutes are fraught with danger and lead to confusion no matter how laudable may be the purpose to benefit these unfortunates. The safer rule would seem to place the burden on the illegitimate to show that the testator intended to include him in the gift and not to attempt to interpret wills in terms of descent statutes.

When the question next arises in West Virginia, our court may feel "bound" by the Toler case but it is submitted that the Toler case is unsound in its holding. As to the statutes like that involved in the O'Hara case declaring the issue to be "legitimate" in view of the outside authorities, it is possible, though undesirable, that the court will allow the legitimated child to take under a devise to "children".

In the case of bastards unborn at the time of the testator's death as in the O'Hara case there is the further question as to whether such a devise is against public policy.

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27 Id. at 482. See Note (1932) 45 Harv. L. Rev. 890.