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VIRGINIA BASTARDY LAWS: A BURDENSOME HERITAGE

DOMINIK LASOK*

The theory that British settlers brought with them as much of the Common Law of England as was appropriate to their circumstances in the New World, propounded by judges¹ and scholars² of the past, rings true because it is a general statement and flexible; and is hardly concerned with the quantum of the law actually adopted. Indeed no detailed evaluation has been attempted.³ It seems that such an evaluation would show that in some areas the connection between the colonies and the mother country should be a source of pride for both countries, but in others only an embarrassing and burdensome heritage. Virginia bastardy laws seem to fall into the latter category.

A comparative study of the law of bastardy of England and Virginia demonstrates a curious affinity at the source and throughout the evolution of the two systems. In some respects the law of Virginia outpaced that of the mother country, yet when English law took a turn towards a modern outlook during the fourth quarter of the last century the law of Virginia not only stopped in its tracks but, one might say, lapsed into the primitiveness of the common law doctrine.

ENGLISH LAW AT THE TIME OF THE JAMESTOWN SETTLEMENT

The sources of Anglo-Saxon law reveal little interest in the status of children because family relations were determined by the membership of the group or clan rather than the legal status of the progenitors. Christianity emphasized the importance of marriage as the basis of family relations and the early state insisted on a division of courts and

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1. *Moris v. Vanderen*, 1 U.S. (1. Dall.) 64, 66 (1782) (per McKean, C.J.); *U.S. v. Worrall*, 2 U.S. (2 Dall.) 384, 394 (1798) (per Chase, J.); *VanNess v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829) (per Story, J.).

2. TUCKER, *TUCKER'S BLACKSTONE* 107 (1803); KINNANE, *A FIRST BOOK ON ANGLO-AMERICAN LAW* 499 (1932); G.L. Sioussat, *The Theory of the Extension of the English Statutes to the Plantations*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 416 (1907); P.S. Reinsch, *The English-American Law in the Early American Colonies*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 367 (1907).

3. Cf. G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 7 (1960).

jurisdictions. Thus it was decreed in 1072⁴ that common law and canon⁵ law were to be administered by separate courts, this arrangement remaining substantially valid until the 19th century reforms.

The Reformation, in spite of its profound influence on life in the British Isles generally, had a relatively small impact on family law. As a result of Henry VIII declaring himself the supreme temporal head of the Church of England, appeals to Rome from the judgments of the ecclesiastical courts were abolished. But even after the repudiation of the papal authority the jurisdiction of the ecclesiastical courts remained substantially unchallenged until the Civil War of 1649 broke their power. But even then they retained exclusive jurisdiction in probate and matrimonial matters.

Prior to the great reform of the canon law at the Council of Trent (1545-1563) the Church adopted the Roman law concept of marriage as a free consent of the parties intended to create a lawful union for life. To this the Church added the requirement of a religious ceremony of a public nature in order to comply with the sacramentality of marriage and to provide evidence of its occurrence. However, it was only at the Council of Trent that the canon law of marriage insisted on the solemnity of a ceremony performed before a priest and witnesses. Although the decrees of the Council of Trent were not recognized in England, the custom of a church ceremony was generally observed from Anglo-Saxon⁶ times.

After the Reformation, Doctors of Civil Law (i.e., Roman law) replaced the canonist lawyers in the administration of ecclesiastical law, but the body of law remained substantially unchanged.⁷ Consequently, there is an unbroken contribution of the pre-Tridentine canon law to the matrimonial law of England and consequently also to the early law of Virginia.

The move towards secularization was slow, and since only ministers

4. E. JENKS, *A BOOK OF ENGLISH LAW* 18 (5th ed. 1952).

5. I.e., the system of law, common in a general sense, to all Christian countries in the middle ages formulated by ecclesiastical lawyers learned in Roman Law, but first systematized by Gratian of Bologna in the 12th century.

6. E. Young, *The Anglo-Saxon Family Law*, in *ESSAYS ON ANGLO-SAXON LAW* 171 (1876).

7. The only legislation passed during the reign of Edward VI affected the celibacy of the clergy. The first statute of 1548 enabled the clergy to marry and the second, passed in 1551, amplified the former by establishing the clergyman's right to curtesy, his widow's right to dower and the legitimacy of the children. These statutes were repealed during the reign of Queen Mary, were restored by James I, and so remain part of English law to this day.

of the Church of England were competent to perform the ceremony of marriage (which was compulsory), this rule was extremely harsh on Jews and Christian non-conformists.

This, in turn, led to a great number of clandestine marriages quite apart from notorious abuses at the hands of bogus parsons who for reward specialized in this ignominious trade.⁸

Thus at the time of the Jamestown settlement the law of England knew three methods of contracting a valid marriage:

(1) *in facie ecclesiae*, i.e., a public religious ceremony after the publication of banns (or dispensation with banns granted by ecclesiastical authority), and with the consent of parents or guardians if the parties were under age;

(2) clandestine celebration privately, in the presence of a priest before the Reformation or a person in holy orders after the Reformation, without publication of banns or consent of parents or guardians in the case of persons under age, provided they had attained marriageable age (i.e., 12 and 14 years respectively) by canon law;

(3) *per verba de praesenti* or *per verba de futuro*, i.e., mere consent without a presence of a clergyman or *in facie ecclesiae*—a method commonly used on the continent of Europe before the Council of Trent. Such a marriage was valid and indissoluble by Natural Law,⁹ to which the canon law subscribed, so that if either party subsequently went through a form of marriage with another, the latter marriage could be annulled.¹⁰ The parties could not release each other, and either of them could obtain from an ecclesiastical court an order compelling the other to go through a ceremony *in facie ecclesiae*.¹¹ However, unlike the other two forms ((1) and (2)), this consensual marriage did not produce all the legal effects of a valid English marriage because it had neither the full effects of *consortium* under common law nor rendered the issue legitimate. A proper ceremony was required to raise the status of this kind of marriage.

An attempt to introduce a uniform form of civil marriage to be solemnized before a justice of the peace was made during the Commonwealth, but the relevant Act of 1653 was not confirmed at the Res-

8. Cf. C. DICKENS, *THE PICKWICK PAPERS*.

9. *Jesson v. Collins*, 91 Eng. Rep. 380 (K.B. 1795).

10. *Bunting v. Lepingwell*, 76 Eng. Rep. 950 (K.B. 1585).

11. *Baxter v. Buckley*, 161 Eng. Rep. 17 (Eccl. 1752).

toration in 1660, and so this highly unsatisfactory position continued until 1753¹² when Lord Hardwicke's Marriage Act was passed "for the better prevention of clandestine marriages."

Divorce was practised in Anglo-Saxon¹³ times, but Christianity set its face against such customs. When canon law became established all over the country the indissolubility of marriage and its sacramental character became the predominant features of the legal concept of marriage. Thus only death could bring a valid marriage to an end. However, in practice, the rule was not applied absolutely, and the manipulation of the notion of nullity proved quite a useful expedient. Thus, under the pre-Tridentine canon law the grounds of nullity were quite extensive. Moreover the institution of clandestine marriage played a significant part as a source of mischief in matrimonial relations and a contributor to the nullity scandal.

In the absence of judicial divorce, which under the impact of the Reformation was introduced in Scotland as early as 1560,¹⁴ the Parliament of England was the only authority competent to terminate a valid marriage in the life-time of the spouses. The first divorce by Act of Parliament is reputed to be that of the Marquis of Northampton in 1551, whilst the Norfolk Divorce Act of 1700 is said to be the model of subsequent decrees.¹⁵ However, this remedy was cumbersome, costly and available only to the upper classes. It certainly was not a popular remedy, though its machinery was adopted in Virginia.¹⁶

While the institution of marriage remained in the realm of canon law and the jurisdiction of ecclesiastical courts, the economic and personal aspects of marriage fell gradually under the regime of common law and equity.

The status of children was determined by the relationship of their parents, that is whether or not they were married in the eyes of the law at the relevant time. The Roman presumption that *pater est quem nuptiae demonstrant* applied to the effect that a child was considered legitimate¹⁷ if conceived and born during the marriage; if conceived before but born during the marriage, and if conceived during the mar-

12. 26 Geo. 2, c. 33.

13. Young, *supra* note 6, at 179.

14. First introduced on the ground of adultery and in 1573 on the ground of desertion.

15. R. GRAVESON AND OTHERS, A CENTURY OF FAMILY LAW 5 (1957).

16. 5 HENING, STATUTES AT LARGE 216 (1823) [hereinafter cited as HENING]; 13 HENING 97.

17. 1 BLACKSTONE, COMMENTARIES 440.

riage but born within a reasonable¹⁸ period since the termination of the marriage. All other children were illegitimate. However, difficulty often focused on the controversy concerning the validity or existence of the marriage, and this was determined by an ecclesiastical court. The right to inherit land, which depended on the status of legitimacy, was, on the other hand, decided by a common law court with the assistance of a jury. Conflicts between these two jurisdictions were not uncommon with the result that a person may have been designated legitimate by one and illegitimate by the other.

The decretal of Pope Alexander III to the Bishop of Exeter¹⁹ authorized the adoption of the well-known Roman law device of *legitimatio per subsequens matrimonium* and indeed the institution of legitimation became part of ecclesiastical law. However, an attempt by the Bishops to introduce legitimation by subsequent marriage to the common law of England was spurned by the law Barons at the Council of Merton.²⁰ When asked to change the law of inheritance so as to enable children born before their parents' marriage to inherit their father's land on his death the Barons uttered the famous cry: "*Nolumus Leges Angliae Mutare.*" Consequently a child legitimated in the eyes of the Church continued to suffer under the common law doctrine of indelibility of bastardy well into the 20th century when the law was changed by statute.²¹ For practical purposes the common law principle prevailed, for instead of referring the question whether a person was born before or during the parents' marriage to an ecclesiastical court the common law courts determined the issue themselves through the instrumentality of a secular jury. As in the case of disputed marriage the law spoke with a divided tongue.

Children born of unmarried parents or an invalid marriage were illegitimate and subject to social and legal discrimination. The doctrine of *filius nullius* applied so much so that neither the mother nor the father had any rights or duties in respect of such children, and the children had no rights of inheritance from either parent. The duty of

18. Although no definite rules with regard to the period of gestation were developed, one cannot accept literally the statement attributed to Baron Rolfe during the reign of Henry IV that a widow may give birth to a child within seven years from her husband's death without injury to her reputation.

19. Stone, *Illegitimacy and Claims to Money and Other Property; A Comparative Survey*, INT'L & COMP. L.Q. 507 (1966).

20. 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 218 (1923).

21. Legitimacy Act, 16 & 17 Geo. 5, c. 60.

parental care seems to have been merely a moral one depending on the *de facto* relationship between the parent and child. Where no such relationship existed the child was at the mercy of charity, first of the Church, later of the parish under the poor law system.

In one respect bastardy could have been an asset. It was established in 1325²² that if a lord was claiming the return of an escaped villain "... a plea that he or any of his male ancestors was a bastard was a peremptory answer to the lord because a bastard is a *fillius nullius*, and it cannot be presumed that this unknown person was a villain. . .," although according to Bracton a bastard followed the status of the mother.²³ This advantage vanished with the disappearance of villains.

The first landmark in the evolution of the law was the Poor Law Act of 1576²⁴ which seems to have earned a great devotion among the early Virginians and still lingers in these parts. Having expropriated the property of the Church, Parliament ordained that the parish should be responsible for the maintenance of illegitimate children. Accordingly, the justices of the peace were given power to investigate instances of bastardy and to punish the mother as well as the father of the illegitimate child. They could also make orders for the upkeep of the bastard by charging the mother or the father with the payment in cash or kind as they deemed fit.

It is significant that the statute was not interested in the legal status of the child or his rights in respect of his parents. It was simply concerned with the alleviation of the burden of the parish where such a child was born and kept "... in defrauding of the relief of the impotent and aged true poor of the same parish, and to the evil example and encouragement of the lewd life. . . ." ²⁵

Such, in brief, was the state of English law at the time of the Jamestown settlement: ill-defined and uncertain as far as the status of the child was concerned; repressive as it tended to visit parental sins upon children and chartering a system of public welfare rather than insisting on individual responsibility of the progenitors. In practice the brunt of illicit sexual relations was to be borne by the mother and the child to whom indenture into service or the workhouse was to provide a refuge from starvation.

22. Y.B. 19 Edw. 2, 651, 654 (1325).

23. 3 HOLDSWORTH, *supra* note 20 at 498-99.

24. 18 Eliz. 1, c. 3.

25. 18 Eliz. 1, c. 3, s.2.

EARLY VIRGINIA LEGISLATION

The early settlers were preoccupied with matters other than the subtleties of the personal status of the individual. Their laws were few and simple concerned with the basic needs of the settlement: economics and order, the cultivation of tobacco, relations with the original inhabitants, hogs and such like matters, mundane though vital for the colony.

Marriage and Children's Status

From the very start the inadequacy of the English law of marriage became manifest as it was necessary, as early as 1628,²⁶ to make a proclamation forbidding marriage "without license, or asking in church." In contrast the English, as we have noted earlier, muddled through the uncertainty of marriage laws and the mischief of clandestine marriage until the passing of Lord Hardwicke's Act of 1753. Another mischief, that of the clandestine marriage of infants, which lingered in England well into the 20th century²⁷ was soon brought to an end by the General Assembly, which provided that "... minors under 21 cannot be married without consent of their parents or guardians given personally or by sufficient testimony. . . ." ²⁸

Official registration of births, deaths and marriages was introduced in England as late as 1836.²⁹ Prior to that date parish registers were the only reliable source of information on human pedigree, but the system was entirely voluntary. Official registration was introduced in Virginia by the General Assembly of 1631-1632.³⁰ The duty of keeping appropriate registers was imposed upon the ministers of the Church and church wardens and backed by a penal sanction.

Having put the formalities of marriage on a sound legal basis the early Virginians laid foundations for a clearly definable status of the offspring. Thus where man and woman were united in matrimony in a public and solemn ceremony preceded by license or publication of banns, such ceremony being duly recorded, there was no reservation about the legal status of children born to such a woman. Subsequent invalidity of the marriage did not upset the status of children, but quite clearly offspring of concubinage could not benefit as the doctrine of common law mar-

26. 1 HENING 130.

27. Age of Marriage Act, 19 & 20 Geo. 5, c. 26.

28. 1 HENING 156.

29. Births and Deaths Registration Act, 6 & 7 Will. 4, c. 86.

30. 1 HENING 158.

riage was purposely repudiated.³¹ Correspondingly children of "un-married" mothers were illegitimate. Rebuttal of the presumption of legitimacy was not unknown as the records of 1640 show an instance of bastardizing a child born to a married woman by a simple device of a confession made under oath by the mother to a midwife. The child was, by virtue of the confession, adjudged to be of "another man."³²

Morality by the Act of the Assembly

The law was clearly set against extra marital relations. The early acts were very much concerned with the moral welfare of the individual. A church was instituted, whose ministers were to conform to the canons of the Church of England, whilst the faithful were liable to punishment for being absent from divine service.³³ The orthodoxy of the Church of England and the uniformity of worship throughout the colony was later secured by law which ordered the ministers to preach the doctrine of the Church of England,³⁴ the deportation of "popish priests,"³⁵ disablement of "popish recusants" from holding any offices³⁶ and the suppression of Quakers.³⁷

The duty of bringing up children in Christian religion (of the recognized brand) was first imposed upon guardians of orphans,³⁸ and later extended to "masters of families,"³⁹ who incurred penalties for failing to send their children "to be instructed and catechised" by the minister of the established church.

Where the preaching and positive enactments bidding the individual to lead a chaste and God-fearing life failed the law reacted with anger and severity. Stern measures, adopted from England, were to combat crime and repress adultery and fornication.⁴⁰ Church wardens were charged with the presentment of such offenses not only from their own knowledge but also from information of others.⁴¹ To make sure that they did their duty a penalty was provided against the defaulter.

31. *Id.* at 552.

32. *Id.* at 149.

33. *Id.* at 155.

34. *Id.* at 277.

35. *Id.* at 268.

36. *Id.*

37. *Id.* at 532.

38. *Id.* at 260.

39. *Id.* at 311.

40. *Id.* at 172, 310, 433.

41. *Id.* at 309.

Clearly such measures were intended to strengthen the lawful family and discourage extra-marital commerce. But even so the stern arm of the law could not control the flesh absolutely. The minutes of the Judicial Proceedings of the Governor and Council of Virginia, dated September 17, 1630,⁴² reveal that one Hugh Davis was ordered to be "soundly whipped" before an assembly of Negroes and others for "abusing himself to the dishonor of God and shame of Christians by defiling his body in lying with a negro, which fault he is to acknowledge next Sabbath Day. . . ." ⁴³ No doubt the punishment and its execution was devised to purge and deter but the record reveals a deeper motive to be consummated in the doctrine and law against miscegenation.

Hugh Davis having expiated his crime seems to have incurred no liability to his partner. However, a certain Edward Grymes,⁴⁴ "because he lay with Alice West," was ordered to give security "not to marry any woman till further order from the Governor and Council." Presumably Alice was a white woman as there is no mention of exemplary flogging and the lady's name is revealed. Maybe incapacity to "marry any woman" (or should it be any other woman?) until further order imposed upon Grymes was a punishment of a kind, in which case Alice got off rather lightly; maybe it was a preventive measure to ensure that Alice was not left with a bastard child and without a prospect of marrying the child's father. The absence of further record may perhaps be taken to mean a happy ending for all concerned.

Not so happy was the lot of an unnamed Negro woman who was ordered to be whipped, while her partner in crime, a certain Robert Sweet, was ordered to ". . . do penance in Church according to laws of England for getting a negro woman with child. . . ." ⁴⁵ The reference to English law is obscure, to say the least, but here repression and racial discrimination can be seen at work in a sinister partnership.

The brief mention of "two maids got with child at sea, ordered to be sent back again" by the Governor and Council on February 1, 1632⁴⁶ is full of eloquence. It seems that the tedium of the long voyage in a crowded boat robbed these maids of the prospect of marriage and home in the new world. Clearly they were unwanted. In those stern days it was apparently nothing to expose those girls to the perils of the voyage

42. *Id.* at 146.

43. Negroes were first introduced in 1620 from a Dutch ship.

44. 1 HENING 551. (Extract from minutes of the proceedings of the Governor and Council of Virginia, Dec. 16, 1631).

45. *Id.* at 552.

46. *Id.*

and confinement in a small boat. This was their punishment in accordance with the spirit of puritanical repression which ruled the colony.

Bastardy Confined to People of Lower Status?

The word bastard seems to have been mentioned for the first time in an Act passed during the 1657-1658 session of the General Assembly.⁴⁷ The Act was concerned with marriages of servants, the problem regulated earlier⁴⁸ by the simple means of punishing servants "marrying without the leave of their masters" and committing fornication.

The law of master and servant figures prominently in the legal annals of early Virginia,⁴⁹ and as time progressed it became in some respects coupled with the law of slavery. But to return to the Act. The wording of the Act is not altogether clear as it could mean that marriages of servants celebrated without their respective masters' consent were void, but the better construction seems to be that such marriages if otherwise valid simply entailed punishment of the servant and a compensation to the master. Thus the master was entitled to an additional year of service on the expiry of the term. If a freeman married a servant he must compensate the master by paying double the value of the extra service owed by the servant on her marriage without her master's consent. A manservant guilty of fornication with a maidservant had to serve her owner one year or pay him compensation and give security to indemnify the parish against the expenses of the upkeep of the child.

A freeman begetting a bastard (here the word "bastard" appears for the first time) through a servant woman was liable to the same punishment. He also had to furnish security for the upkeep of the child. The woman was punished too. At that time the punishment for fornication consisted of whipping and a fine of 500 lbs. of tobacco payable, in accordance with the territorial principle of criminal law, to the parish where the crime was committed. The crude law did not consider the possibility of several places of crime or the apportionment of the fine between several competing parishes.

Poor Law to the Rescue

In addition to being the basic bastardy statute the Act is significant in at least two material particulars. In the first place it reflects section 2

47. *Id.* at 438.

48. *Id.* at 252.

49. *Id.* at 254, 274, 401, 411, 438, 430, 445, 517; 2 HENING 26, 113.

of the English Poor Law Act of 1576,⁵⁰ by providing repressive measures to combat illegitimacy. In the second place it places the care for illegitimate children under the nascent poor law system. The Act is thus an example of the adoption of the relevant portion of English law and of its adaptation to the circumstances of the colony.

As in England at that time neither parent assumed a direct legal liability for the upkeep and upbringing of the bastard. This duty was cast upon the parish in which such a child was born and the parish would recoup itself from the parents. Moreover the parish could improve its funds by collecting the fine for fornication from the putative father and purge the public scandal by having him whipped. The whip also marked on the bare back of the mother an absolution for her crime, whilst her fine for fornication wiped off her liability to maintain the child. The child had no remedy against either parent, and the woman had no redress against the man who contributed to her disgrace.

Although the liability of the parish to cater for illegitimate children has not been expressly mentioned in previous legislation the poor law system must have absorbed destitute children of that class. Some rudimentary facilities were already in existence. An Act of 1642⁵¹ recognized a public duty of care for destitute children in so far as it authorized the building of two houses in James City to accommodate poor children to be employed in the public flax houses. The alternative, of course, was to have such children, like destitute orphans, bound to some manual trade under the authority of the Act of 1656.⁵²

It can be seen from the foregoing that the early colonial legislation embodied the premises of English law and social policy. The criminal sanction was allowed to overshadow completely the civil responsibility for bringing into this world a child the society did not want and this in turn cast upon the society the ultimate responsibility for illicit procreation.

LATER COLONIAL LEGISLATION (1661 TILL INDEPENDENCE)

Two features dominate the evolution of Virginia law during the period under consideration: a tendency to clarify the law and to improve the standard of legislation. As far as our subject is concerned these tendencies were reflected in an effort to define parental responsibilities, and to clarify the legal position of the parish within an im-

50. See note 24, *supra*.

51. 1 HENING 336.

52. *Id.* at 416.

proved poor law system. Once more the Virginians sought to enhance the authority of their law through their resolve "to adhere to those excellent and often refined laws of England to which we profess and acknowledge all due obedience and reverence. . . ." ⁵³

As previously a great deal of legislative effort was put into the moral welfare of the colony. Religious orthodoxy became firmly entrenched as the Assembly ordered observance of the canons of the Church of England.⁵⁴ Persons who refused to have their children baptized (presumably into the Church of England) were to be punished by fine;⁵⁵ Quakers⁵⁶ and Catholics⁵⁷ were to be suppressed. The latter, described as "popish recusants," ⁵⁸ were grouped together with Negroes and Indians and declared incapable of being witnesses and by a later Act⁵⁹ were to be disarmed. The law insisted on the uniformity of religious practices and high moral standards. Legislation was passed ". . . for effectual suppression of vice and restraint and punishment of blasphemous, wicked and dissolute persons. . . ." ⁶⁰ By an Act of 1705⁶¹ adultery and fornication committed by persons who were not servants or slaves attracted a fine,⁶² though previously one William Bung was committed to prison for fornication with the widow of John Billingsby.⁶³ More drastic penalties were provided for servants and Negroes,⁶⁴ while fornication with a Negro attracted a double fine for a person who was not a servant.⁶⁵

It is difficult to assess the efficacy of these measures. Bastardy continued to be a problem to which the Assembly had to devote a great deal of attention as witnessed by various acts directly or indirectly affecting the position. However, before considering these acts we have to examine once more the evolution of the law of marriage as impinging directly on the meaning of illegitimacy.

53. 2 HENING 43.

54. *Id.* at 47.

55. *Id.* at 165.

56. *Id.* at 180.

57. 3 HENING 298, 504; 4 HENING 285.

58. *Id.*

59. 7 HENING 35.

60. 3 HENING 358.

61. *Id.*

62. *Id.*

63. 2 HENING 162.

64. *Id.* at 114; 3 HENING 87, 137.

65. 2 HENING 168.

Marriage and the Status of Children

As in the previous period the formal validity of marriage took a substantial share of the legislation, but in addition the essential conditions of a valid marriage were also settled. Following the established principle marriage⁶⁶ could be celebrated only by ministers of the recognized church "according to English law," but unlike in England, the solemnities had to be preceded by a license issued from the civil⁶⁷ authority or banns read in church. The sanction for non-compliance was severe. The officiating minister was liable to punishment, the pretended marriage was null and void, children of such a union were visited with the stigma of illegitimacy, and the parties themselves were liable to prosecution for fornication.⁶⁸ Certificates for marriage of persons under age were valid only if issued by the clerk of the county where the parents or guardians were resident and the clerk could issue such certificates only with the personal consent of parents or guardians.⁶⁹

By a subsequent Act⁷⁰ for the prevention of clandestine marriages the General Assembly repealed the above law as being too lenient, but re-enacted it substantially providing for the punishment of clerks for irregularities in the issue of licenses and tightening the requirements of parental consent. The Act provided further that females between the ages of 12 and 16 who contract marriage without the requisite consent would forfeit their inheritance to their next of kin. This sanction seems to have a twofold objective: to punish such girls and to discourage enterprising males from flouting the law.

This Act was in turn repealed and re-enacted in 1705⁷¹ with certain innovations aiming at improving the publicity of intended marriages, a better control of marriages of persons under age, and supervision of the issue of licenses. A further repeal and re-enactment in 1748⁷² resulted in a much improved system and check on the abuse of the law. The clerk was authorized to take from the prospective husband and wife "a bond with good surety for the sum of 50 pounds current money to the King . . . with condition that there is no lawful cause to obstruct the marriage. . . ."

66. *Id.* at 50; 3 HENING 149, 449; 6 HENING 81.

67. 2 HENING 54.

68. See note 66, *supra*.

69. 2 HENING 281.

70. 3 HENING 149.

71. *Id.* at 441.

72. 6 HENING 81.

The system of registration⁷³ of births, marriages and deaths continued to operate, thus contributing to the certainty of the legal status of children. An Act of 1713⁷⁴ reinforced the fabric of the existing law by casting upon parents, masters and overseers of the poor the duty of registering the birth of free and slave children.

Legislation concerned with the essential validity of marriage began characteristically with an "Act for suppressing outlying slaves."⁷⁵ The measure was penal and repressive as the Act provided, *inter alia*, that "white man or woman, bond or free, intermarrying with a Negro, mulatto or Indian is to be banished for ever." The foundation of the anti-miscegenation law being laid down earlier⁷⁶ the Act did not expressly pronounce upon the validity of such marriages, but there is no doubt that the sanction of nullity was written in the peremptory words of the statute.

The principal Act touching the essential validity of marriage was enacted in 1730⁷⁷ "for enforcing the Act intituled: An Act for the effectual suppression of vice; and restraint and punishment of blasphemous, wicked and dissolute Persons; And for preventing incestuous marriages and copulations. . . ." The title speaks for itself.

The essential point to observe is that the Act expressly adopted, for the first time in Virginia, the levitical system of prohibited degrees of consanguinity instituted in England during the reign of Henry VIII.⁷⁸ Previously English law may be deemed to have been part of the law of the colony on the general principle of adoption of English common law to meet the requirements of the settlers.

The Act provided also for the machinery of enforcement of its provisions and boldly departed from the doctrine of void and voidable marriages, which to this very day has bedevilled the English system. The Virginians wisely insisted upon a judgment of the general court, which under previous legislation was endowed with common law, equity and ecclesiastical jurisdictions, administered in England by separate courts well into the 19th century. The judgment was retrospective and children born into such a union were deemed illegitimate.⁷⁹

73. 2 HENING 54.

74. 4 HENING 43.

75. 3 HENING 86.

76. See pp. 416-21 *infra*.

77. 4 HENING 244.

78. Marriage Act, 32 Hen. 8, c. 38.

79. 32 Hen. 8, c. 38, s. 5.

Servants, Bastards and the Poor

It is significant that a direct reference to illegitimate children should be found in the Act⁸⁰ dealing with the suppression of fornication among servants, and the poor law system. Thus the compass of the legislation tends to reflect the character of bastardy law as being concerned not so much with the legal status of the illegitimate child and his relations with his parents, but with bastardy as a social problem confined to servants and the poor.

During the 1661-62⁸¹ session, the General Assembly decreed, in an Act against fornication among servants, that the child is bond or free according to the status of his mother; and that if there is a child as a result of fornication the mother must serve two years after her indenture or pay 2,000 lbs. of tobacco to her master in addition to a fine or physical punishment (whipping) for the offense. The reputed father had to put in a security to keep the child and so indemnify the parish, which was responsible for the upkeep of poor persons. Inadvertently the Assembly played into the hands of the unscrupulous masters who could thus derive a benefit of extra 2 years of service out of fornication with their female servants. This the Assembly sought to remedy a year later by providing⁸² that such a woman should be sold by the churchwardens of the parish where she lived at the time she gave birth to her child for two years after the expiration of her indenture, and that the money so raised should be employed for the benefit of the parish. The possibility of her being released must have been considered by the Assembly as they thought that such a provision would induce such women "... to lay all their bastards to their masters. . . ." ⁸³ So, for the time being, the severity of the law focused on the mother and the child.

It was considered that the father's punishment consisted in the keeping of the child which meant in practice that he had to defray the expenses incurred by the parish. However, it was not always possible to exact payment from the putative father especially if he was a servant. To meet this contingency the Act provided that the parish should keep the child during the father's service, and that he would defray the expenses after the expiration of his indenture.⁸⁴

The selling of the servant woman by the churchwardens must have

80. See note 47, *supra*.

81. 2 HENING 114.

82. *Id.* at 167.

83. *Id.*

84. *Id.* at 168.

proved rather cumbersome as in 1696⁸⁵ the law was brought back to the original. The penalty was halved as the woman was required to put in another year of service after the expiration of her indenture or pay 1,000 lbs. of tobacco to her master or mistress in addition to her punishment for fornication. The putative father was, as heretofore, required to provide a security "to keep the parish harmless."

This law was substantially re-enacted in 1705⁸⁶ in an Act concerning servants and the rights and duties of masters. Furthermore it was provided that if the reputed father was free he had to give security to the churchwardens to maintain the child. It was enacted, for the first time, that he may be compelled to do so by order of the county court upon the complaint of churchwardens. By the same Act⁸⁷ the county courts were invested with the jurisdiction to try "... petty offences including fornication, bastardy and the like. . . ." Thus the English statute⁸⁸ of Elizabeth I became reincarnated in the colony.

The previous law with regard to the reputed father being a servant was reinforced by like provision enabling the court to enforce its order.

The Assembly turned also to the question of female servants getting illegitimate children by their masters. The law once more turned a somersault as it reverted to a formula once used and discarded, that is, that the mother would be sold for one year after the expiration of her indenture or by order of the court made to pay 1,000 lbs. of tobacco and the said fine or whatever she should be sold for would then be turned to the use of the parish. The master, if the father of the child, would as previously suffer punishment for fornication and pay for the upkeep of the child. In addition the indenture may be terminated by court order.

A stiffer penalty was provided for a woman servant (or a free woman) having an illegitimate child by a Negro or mulatto:⁸⁹

. . . And if any woman servant shall have a bastard child by a negro or mulatto, over and above the years service due to her master or owner, she shall immediately upon the expiration of her time to her then present master or owner, pay down to the churchwardens . . . 15 pounds current money in Virginia, or be by them sold for 5 years to the use of the aforesaid. And if a

85. 3 HENING 137.

86. *Id.* at 452.

87. *Id.* at 404.

88. See note 24, *supra*.

89. See note 86, *supra*.

free Christian white woman shall have such bastard child by a negro or mulatto, for every such offence, she shall within one month after her delivery of such bastard child, pay to the churchwardens for the time being, for the use of the said parish 15 pounds current money of Virginia, or be by them sold for 5 years to the use of the aforesaid

The unfortunate child was to be punished too as the churchwardens were empowered to bind him “. . . to be a servant until he shall be of thirty-one years of age.”⁹⁰

In the light of the aforesaid it was not only inconvenient but also highly hazardous to have a bastard child. No wonder women were driven to further crime in order to get out of their predicament. This the law purported to remedy with a characteristic severity. The Act⁹¹ “to prevent the destroying and murdering of bastard children” referred in the preamble to “. . . several lewd women who murder their bastard children or otherwise deal with them in a suspicious manner . . .” and provided death penalty for such acts. The accused could exculpate herself by proving that the child was stillborn.

As can be seen from the preceding pages the administration of bastardy laws was in the hands of churchwardens, later operating under the orders of county courts. To complete the system the English vagrancy law was expressly adopted by statute,⁹² which enabled the courts to place orphaned and neglected children, as well as illegitimate children under public supervision. The parish was responsible for the upkeep of its poor and the illegitimate child, as a *filius nullius*, was from his birth in the charge of the churchwardens of the parish in which he was born. Bastardy presented special problems, and these were considered in two statutes. The Act of 1727⁹³ was concerned, *inter alia*, with “. . . the more effectual discovery and prosecution of persons having bastard children. . . .” The Act of 1769⁹⁴ supplemented the former as being enacted “. . . for the relief of parishes from such charges as may arise from bastard children born within the same”

The former statute reiterated what has been said with regard to the responsibility of the parish and the philosophy of repressive laws. Having recognized the difficulties arising from the fact that women with

90. *Id.*

91. 3 HENING 516.

92. 2 HENING 298.

93. 4 HENING 208.

94. 8 HENING 374.

illegitimate children were given to machinations designed to obstruct the course of law the statute provided that⁹⁵ “. . . whenever . . . any lewd woman shall be delivered of a bastard child, and be thereof lawfully convicted, she shall for every such offence, be liable and compellable to pay the sum of 500 lbs. of tobacco and cask, or 50 shillings current money of Virginia. . . .” This fine with costs was made recoverable by the then existing legal process. For failure to discharge her obligation to the parish she was liable to “. . . receive on her bare back, at the public whipping post, twenty-five lashes, well laid on. . . .” Having paid her due or suffered the whipping she was “. . . discharged of all further or other prosecution. . . .”⁹⁶

The law imposed the duty of denouncing such women on any person in whose house the child was born. The punishment for failure was severe: the same fine as the mother and in the event of non-payment or refusal to give security, twenty-five lashes.⁹⁷

In spite of all these stringent measures the preamble to the Act passed in 1769⁹⁸ recorded a failure of the existing law “. . . to provide for the security and indemnifying the parishes from the great charges frequently arising from children begotten and born out of lawful matrimony. . . .” So, at last, the heat was turned on the reputed father. It is interesting to note that the law differentiated between servants and free persons who were not servants. The Act applied only to cases in which an illegitimate child was chargeable⁹⁹ or was likely to become chargeable to the parish. It resolved to respect the autonomy of the family as the mother had to be “single” and incapable of providing for the child, and thus purported to move within the framework of the poor law system. It provided for a judicial inquiry as to the alleged paternity in the event the mother charged a man, not a servant, with being the father of her child. Although the mother was the prime mover it was really up to the churchwardens to decide whether or not the proceedings should be put into motion. Once cognizant of the complaint the justices of the peace were competent to secure the appearance of the accused at his trial, and to determine from the evidence before the court whether the charge had been proved. In the event of a positive conclusion the court would, within their discretion, determine

95. 4 HENING 208, s. 13.

96. *Id.*

97. *Id.* at 208, s. 14.

98. 8 HENING 374, s. 1.

99. *Id.*

the liability of the reputed father as regards the amount and the duration of his contribution towards the upkeep of the child. The court had power to order securities and effect execution on the property of the reputed father or his sureties. Imprisonment of the defaulter was the ultimate sanction. The mother was still liable to pay a fine but would no longer be whipped or compelled to give security.¹⁰⁰

If the mother was a servant¹⁰¹ she was bound to serve for another year on the expiration of her contract or pay the master 1,000 lbs. of tobacco to compensate him for his loss and trouble. The reputed father, if free, had to give security to the churchwardens or be compelled to provide for the child's care by order of the county court. Should the mother be a convict servant (and thus disabled from giving testimony) or should the reputed father remain unknown or outside the reach of the law the duty of maintaining the child would be cast upon the master in consideration of the service of such child, if a male until 21, if a female until 18 years of age.

Having defined the responsibilities of the parents or the master the statute turned to the welfare of the child. Assuming that the child has not been absorbed within the family the Act¹⁰² provided that every illegitimate child should be bound apprentice, a boy until 21, a girl until 18 years of age. The churchwardens would place the child and presumably look after his interests. The master was liable to look after the child as in the case of ordinary apprenticeship and, upon complaint, could be compelled by the court to do his duty. The court could, of course, remove the child and bind him to another. Analogous rules applied to servants' children,¹⁰³ who, as we have noted, remained with their mother's master. They, too, received a measure of protection as if they were apprenticed, and the county court could, in extreme cases, look into the case and correct abuses.

Eighteenth century Virginia seems to have had a well-established poor law system. Not only were great powers¹⁰⁴ invested in the overseers of the poor, but the poor had to be registered¹⁰⁵ and even were made to wear a badge.¹⁰⁶ The problem of the illegitimate child was left either to his immediate family or the parish within its duty of looking

100. *Id.* at 374, s. 3.

101. *Id.* at 374, s. 5.

102. *Id.* at 374, s. 4.

103. *Id.* at 374, s. 5-7.

104. 6 HENING 475.

105. *Id.* at 475, s. 7.

106. *Id.* at 475, s. 8.

after the poor. The foundation of the state authority in this field was established by the acts of the Assembly very much in imitation of the English system. Repression and social welfare were the characteristic features of the system so much so that the child's legal status had hardly any significance. In this respect the Anglo-American approach differed radically from the Civil Law approach where the idea of the child's rights and parental responsibility to the child directly was gaining momentum.¹⁰⁷

MODERN LAW OF VIRGINIA

The era of modern law began significantly with the repudiation of English law enacted after the "4th year of the reign of James I."¹⁰⁸ However, this formula had little impact as far as illegitimate children were concerned, because since the Jamestown settlement a body of a truly Virginian law had developed. It is a different matter that it did not survive to date.

Looking at the performance of the General Assembly one can observe less vigor in the sphere of moral law. Statutes which authorized punishment of religious dissenters were repealed,¹⁰⁹ and finally religious freedom was asserted as one of the natural rights of men.¹¹⁰ The state no longer claimed control of conscience, and religious orthodoxy was no longer regarded as necessary for the moral welfare of the society. However, fornication and adultery continued and still continue¹¹¹ to be crimes. Bigamy was defined by statute,¹¹² and punishable subject to a defense of 7 years' absence, divorce or nullity of the previous marriage. The law forbade "forcible marriage"¹¹³ and declared carnal knowledge of girls under 10 years of age to be a felony.¹¹⁴

There was a great deal of legislation concerning marriage¹¹⁵ and divorce,¹¹⁶ but the importance of the law of marriage as the factor determining the status of children declined because children born of

107. BRINTON, FRENCH REVOLUTIONARY LEGISLATION ON ILLEGITIMACY 1789-1804 (1936).

108. 9 HENING 126.

109. *Id.* at 164.

110. 12 HENING 84.

111. VA. CODE ANN. §§ 18.1-187-215 (1950).

112. 12 HENING 697.

113. 13 HENING 7.

114. 12 HENING 10.

115. VA. CODE c. 108, §§ 1-13 (1849).

116. ACTS AND JOINT RESOLUTIONS OF GENERAL ASSEMBLY OF COMMONWEALTH OF VIRGINIA, c. 23 (1827).

null and void marriages were by statute made legitimate.¹¹⁷ The introduction of the concept of a "marriage absolutely void"¹¹⁸ on the ground of race and bigamy, for which no decree of nullity was required, seems a retrograde step leading to *de facto* marriages and uncertainty of the legal status of children.

In the field of inheritance the position of illegitimate children was greatly ameliorated as in certain circumstances they were given the same rights as their legitimate brothers or sisters. The statute¹¹⁹ provided that bastards shall be capable of inheriting from their mother and of transmitting inheritance on the part of the mother as if born in lawful wedlock. Their right of inheriting and transmitting inheritance from the reputed father is on a different footing and of a more limited application. They have to be legitimated¹²⁰ by subsequent marriage of their natural parents and recognized by their father. Without legitimation the only other possibility is adoption or a specific bequest under their father's will. In this respect the law of Virginia by far outpaced English law. In England legitimation by subsequent marriage has since 1926¹²¹ put the legitimate child in the position of a child born in lawful wedlock subject to minor restrictions on inheritance of title of nobility and land attached to such title. However in the absence of legitimation an illegitimate child can inherit on his mother's intestacy only if he has no legitimate brother or sister.¹²² He has no right in respect of the father unless adopted by him or remembered in his will. There is a good prospect of an improvement of the rights of the illegitimate child as a recent Committee of Enquiry¹²³ recommended that the disability as far as the inheritance from the mother be removed, and a child whose paternity has been established be regarded as a dependent of his putative father for the purpose of maintenance under statutes which modify the testamentary freedom of a person liable to support others.¹²⁴ This amendment of the law has been foreshadowed by legislation which gave the illegitimate child a right to claim compensation under the Fatal Accidents Acts.¹²⁵

117. 12 HENING 688.

118. VA. CODE c. 109, §§ 1-3 (1849).

119. 12 HENING 688, s. 5.

120. *Id.* at 688, s. 6.

121. Legitimacy Act, 16 & 17 Geo. 5, c. 60.

122. Legitimacy Act, 16 & 17 Geo. 5, c. 60, s. 9(1).

123. REPORT OF THE COMMITTEE ON THE LAW OF SUCCESSION IN RELATION TO ILLEGITIMATE PERSONS, § 62(1).

124. *Id.* at § 62(4).

125. Fatal Accidents Act, 7 & 8 Eliz. 2, c. 65.

The abolition of slavery in Virginia¹²⁶ impinged also on the status of children as the Act provided that where colored persons cohabit as husband and wife, whether or not married to each other, they are deemed to be married and their children are legitimate.

A slight change, though quite significant in a sense, in the poor law system shifted in 1785 the responsibility for the charging of putative fathers from the churchwardens to the overseers of the poor.¹²⁷ An Act passed in 1792¹²⁸ went further as it amalgamated the law of illegitimacy with that of the poor and the vagrants. The pattern of paternity proceedings, established earlier¹²⁹ was preserved, but the whole concept of relief of illegitimate children drifted more decisively towards a social welfare system which is in force today. For a while the mother had a right of action,¹³⁰ but even then the recovery was not for herself or the child but for the poor law authority.

An abrupt break from a system which combined social welfare under the poor law system and individual responsibility in the shape of the paternity action was brought about during the General Assembly of 1874-75 when the portion of the Code relating to the maintenance of illegitimate children was repealed.¹³¹ Little is known to the present writer of this episode of the history of law of Virginia. The records are scanty and the explanation of this measure is hardly satisfactory.¹³² The simple fact is that since 1874 Virginia, as distinct from West Virginia¹³³ and the other states, has no paternity action, and so the burden of maintaining the illegitimate child rests on the mother or the society.

The problem of illegitimacy in modern society is baffling, for in spite of education and contraception facilities the rate of illegitimate births is on the increase. Virginia is no exception.¹³⁴ Of the European countries Sweden with her reputation for the most liberal system of family

126. VA. CODE c. 103 (1873).

127. 12 HENING 28.

128. 13 HENING 262.

129. 8 HENING 374.

130. VA. CODE c. 125 § 1 (1849), 1 TUCKER, TUCKER'S BLACKSTONE 130 (1836).

131. ACTS AND JOINT RESOLUTIONS OF GENERAL ASSEMBLY OF COMMONWEALTH OF VIRGINIA No. 112, at 94 (1875); HOUSE JOURNAL AND DOCUMENTS 131, 134 (1874).

132. According to Minor in MINOR, INSTITUTES OF COMMON AND STATUTE LAW 148 (4th ed. 1892), the repeal resulted from a mistaken belief that the law was contrary to the Federal Civil Rights Act of 1866 and the 14th amendment of the Constitution because the paternity action was available only to white persons.

133. W.VA. CODE ANN. § 4770 (1961).

134. Shepherd, *Support of Children Born Out of Wedlock, Virginia at the Crossroads*, 18 WASH. & LEE L. REV. 343, 345 (1962).

law and most extensive social welfare organization has the highest rate of illegitimacy. Obviously both the repressive and the ultra-liberal approach have failed, and the law must look to the individual responsibility for at least a partial answer to the problem. This approach remains yet to be explored both in England and Virginia.¹³⁵

As recently as 1944¹³⁶ the Virginia Supreme Court of Appeals confirmed that there was no legal duty to support an illegitimate child, and that in the absence of a statutory enactment no action could be brought against the putative father.

Shortly after this decision the General Assembly enacted sec. 20-61-1 which provided for limited relief as it imposed on the putative father a duty of supporting the child if he admitted paternity before a court of record.¹³⁷ This measure was further expanded in 1954 to include voluntary admissions of paternity in writing under oath¹³⁸ but, in the light of judicial interpretation,¹³⁹ this provision is likely to be applied restrictively. Quite clearly this small palliative will not do.

Disturbing statistics and the mounting expenditure of the Welfare Department,¹⁴⁰ in spite of the fact that only one tenth of illegitimate children receive welfare assistance amounting to some \$12.80 per child per month, prompted the establishing of a study commission which published its report in 1959.¹⁴¹ The nine-member commission, after an extensive study of problems relating to children born in wedlock, made six recommendations: (1) the legalization of voluntary sterilization; (2) the introduction of a paternity action; (3) the expansion of the Public Welfare Departments; (4) the setting up of field counsellors and maternity homes; (5) the education of the public in the problems of illegitimacy; and (6) the study of compulsory sterilization laws. The commission was unanimous only in respect of the paternity action, and expressed its views in this respect in a draft bill to meet the objective. The draft bill is based on the New York paternity statute,¹⁴² which

135. Cf. Lasok, *Legitimation, Recognition and Affiliation Proceedings*, 10 I. & C.L.Q. 123 (1961).

136. *Brown v. Brown*, 183 Va. 353, 32 S.E.2d 79 (1944).

137. ACTS AND JOINT RESOLUTIONS OF GENERAL ASSEMBLY OF COMMONWEALTH OF VIRGINIA No. 584, at 1016 (1952).

138. ACTS AND JOINT RESOLUTIONS OF GENERAL ASSEMBLY OF COMMONWEALTH OF VIRGINIA No. 577, at 722 (1954).

139. *Distefano v. Commonwealth*, 201 Va. 23, 109 S.E. 2d 497 (1959).

140. *Shepherd*, *supra* note 134, at 346.

141. VA. S. Doc. No. 5, Regular Session 1960, HOUSE AND SENATE DOCUMENTS (1960).

142. 14 CONS. LAWS OF N.Y. ANN. §§ 119-139 (1964).

in turn was inspired by the Uniform Illegitimacy Act¹⁴³ recommended by the National Conference of Commissioners on Uniform State laws in 1922 and so far adopted only by seven states.¹⁴⁴

In accordance with the draft bill both parents of a child are liable for the necessary support, education and funeral expenses.¹⁴⁵ The father is liable for the reasonable expenses of the mother's confinement and recovery in connection with her pregnancy as the court may deem proper.

The parties may come to an agreement or compromise but such arrangement is binding only if approved by the court.¹⁴⁶

The paternity action¹⁴⁷ may be brought by the mother, her personal representative, or by public welfare officials if the child is likely to become a public charge. The complaint must be made under oath¹⁴⁸ and the mother may incur prosecution for perjury if her complaint turns out to be false.¹⁴⁹ The right of action expires one year from the birth of the child¹⁵⁰ unless paternity has been acknowledged by the father in writing or by furnishing of support. However, a public welfare official may bring the action at any time while the child in a public charge is under the age of sixteen.

Both the mother and the alleged father are competent to testify, but the alleged father cannot be compelled to give evidence, though either may be subject to cross-examination once having testified.¹⁵¹

The court, on the motion of the alleged father, may order the mother and the child to submit to a blood grouping test, but the result of the test can be admitted in evidence only in cases where definite exclusion is established.¹⁵²

If satisfied with the evidence the court will make an affiliation order¹⁵³ compelling the father to contribute toward the support and education of the child. The maximum sum which can be awarded is \$100 per month until the child reaches the age of sixteen.

143. *Uniform Act on Paternity*, 9B U.L.A. 522-29 (1966).

144. Iowa, Nevada, New Mexico, New York, North Dakota, South Dakota, and Wyoming.

145. VA. S. Doc. No. 5, *supra* note 141 § 20-126 at 26.

146. *Id.*

147. VA. S. Doc. No. 5, *supra* note 141, § 20-128(1) at 26.

148. VA. S. Doc. No. 5, *supra* note 141, § 20-128(4) at 26.

149. VA. S. Doc. No. 5, *supra* note 141, § 20-140 at 30.

150. VA. S. Doc. No. 5, *supra* note 141, § 20-128 at 26-27.

151. VA. S. Doc. No. 5, *supra* note 141, § 20-132 at 28.

152. VA. S. Doc. No. 5, *supra* note 141, § 20-133 at 28.

153. VA. S. Doc. No. 5, *supra* note 141, § 20-134(2) at 28.

The court may require the father to give security¹⁵⁴ for the payment of the affiliation order, and if he fails to discharge his obligation he may be sentenced to a term of imprisonment.¹⁵⁵

In spite of the fact that the proposed statute embraces the American experience in this field and in many respects provides a more efficacious system than the one at present prevailing in England, the whole idea savours of the English concept and, in the view of the present writer, suffers under the handicaps of the English doctrine.

At the time when the General Assembly of Virginia halted the evolution of the law of illegitimacy English law began to modernize. Under common law neither the mother nor the putative father had any legal duties in respect of the child. The statute of 1576, as we have observed earlier,¹⁵⁶ put the parish in charge of illegitimate children, and authorized the justices of the peace to prosecute and punish the mother and the reputed father and to order both parents to defray the costs of the parish. The legal liability of the mother to maintain the child was established by statute in 1834,¹⁵⁷ and a decade later¹⁵⁸ the mother for the first time was given the right to proceed against the reputed father. This rudimentary form of paternity action was perfected in 1872¹⁵⁹ and the system, subject to slight modifications, became crystalized in 1957.¹⁶⁰ It seems superfluous to go into details of the English paternity action, and so it may suffice to say that it is by no means satisfactory. The fault lies with the concept of the illegitimacy law which developed sporadically in a fragmentary fashion in the shadow of the poor law system.

In that system the personality of the child and his legal status have been submerged completely in the society's preoccupation with the child's upkeep until he is able to earn his own living. This can hardly be described as an attempt to solve the problem of illegitimacy, that is, to remedy the plight of the unmarried mother, to anchor in law the responsibility for procreation, to give legal support to paternal sentiments or to treat the bastard as a citizen entitled to know his parents, to have a legal status in the society and to enjoy the protection of the law. In the whole business of illegitimacy four parties are involved, the two

154. VA. S. Doc. No. 5, *supra* note 141, § 20-136(1) at 28-29.

155. *Id.*

156. See page 407, *supra*.

157. Poor Law Amendment Act, 4 & 5 Will. 4, c. 76, s. 71.

158. Poor Law Amendment Act, 7 & 8 Vict., c. 101.

159. Bastardy Laws Amendment Act, 35 & 36 Vict., c. 65.

160. Affiliation Proceedings Act, 5 & 6 Eliz. 2, c. 55.

parents, the child and the society. Yet in the English system, as much as in the states whose laws have been imbued with the spirit of the English common law, the rights and duties of the four parties are not distributed in proportion commensurate to their respective interests. This, broadly speaking, applies also to the Virginia draft law, which we considered earlier, although the proposed version of the paternity action represents a considerable improvement on the existing form of such actions in the common law countries. In spite of a serious (and quite successful) attempt at balancing up the position of the mother and the reputed father in paternity actions, the draft, in my opinion, still falls short of the chief desideratum, that is of balancing the interests of the four parties. This is so because, to name just two main features, the draft still lingers in the poor law morass and, having postulated that the mother is primarily responsible for the upkeep of the child, purports to impose upon the putative father a duty merely to alleviate that burden. It is quite clear that such a limited objective will not satisfy the needs of modern society or the standards urged by contemporary writers.¹⁶¹

In spite of the many handicaps of an historical and psychological nature contemporary English law has been launched on a more sophisticated career. Parliament recognized that wrongful death of the putative father must not be allowed to cut short the benefits of support enjoyed by his child, and that the doctrine of *filius nullius* can no longer inhibit the creation of a truly parent-child relationship between the putative father and his child.¹⁶² We can thus observe the emergence of the putative father from legal obscurity, and the development of a notion of status of the illegitimate child. The courts have recognized this trend in a number of cases¹⁶³ and in the notorious "blood-tie" case¹⁶⁴ accorded the putative father the right of bringing up his child in preference to a very desirable adoption. Moreover, a commission of enquiry¹⁶⁵ advocated recently an extension of the inheritance rights of the illegitimate child, and a study group¹⁶⁶ acting under the auspices of the Archbishop of Canterbury suggested a drastic reform which

161. Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829 (1966); Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967).

162. See note 125 *supra*.

163. E.g., *In re Aster*, [1955] 1 W.L.R. 465 (C.A.)

164. *Re C.*, [1966] 1 All.E.R. 838 (Ch.).

165. See note 123 *supra*.

166. CHURCH OF ENGLAND PUBLICATION, *FATHERLESS BY LAW—REPORT OF THE BOARD OF SOCIAL RESPONSIBILITY* (1966).

would enable English law to adopt well-proven institutions of the European continental systems of law. It remains to be seen whether these reforms will be implemented. The chances seem to be slender as long as the plight of the illegitimate child resulting from inadequacy of the bastardy laws can serve as a lever to advocates of easier divorce.¹⁶⁷

CONCLUSION

A visitor from England is hardly in a position to advise on the reform of law in Virginia. Indeed some may think that it would be most improper for him to attempt to do so. Yet I cannot help sharing the frustration of those who feel that law can contribute in some ways towards the solution of the social problems of illegitimacy. However, I do not think that adoption of paternity action alone will achieve the desired result. A form of paternity action together with an alternative, and by this I mean a modified form of recognition of illegitimate children by their father at present in force in Virginia,¹⁶⁸ should provide a basis of the parent-child relationship. This relationship, if it is to have any social impact, must as far as reasonably possible be modelled on the pattern of the legitimate family. Thus parental rights and obligations must transcend mere obligations of pecuniary support. It follows that family obligations as well as inheritance rights and wrongful death benefits must be extended to the illegitimate child whose paternity has been established by a court order or voluntary recognition. A glance at enlightened European systems will show that this is possible without undermining the institution of the lawful family. Indeed the object of such law is not to make bastardy respectable but to alleviate the plight of the illegitimate child and his mother, protect the society from unwarranted burdens and extend the protection of the Constitution and equal rights to those who have the misfortune of being born without the blessings of a united parenthood. The formulation of such a statute should not be beyond the wits of those skilled in law, whilst the possible objectors on moral grounds should be reminded that a society which tolerates a relatively high rate of divorce has already come to terms with similar problems arising from the fact of children being born to parents having more than one "lawful" wife or husband.

It seems, therefore, that the rejection by the General Assembly of 1960 of the draft statute should not be mourned. If anything it should

167. Cf. Abse, *Divorce Commonsense*, 6 THE LAWYER 31 (1963).

168. VA. CODE ANN. § 20-61.1 (1950).

provide a stimulus to renewed efforts to present to the General Assembly a regime it can in its wisdom adopt for the welfare of the Commonwealth. This means, of course, repudiation of the burden of English heritage.