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Bastardy - Who May Institute Proceedings

Hugh McCutcheon

husband and upon any and all moneys which he may hereafter attain and acquire as such provision is not a definite liability or a judgment for a specific amount so that it may become a lien upon the husband's property." The court also maintained that equity courts in North Dakota have no inherent power to decree alimony in a divorce proceeding unless specifically authorized by the statute. *Leifert v. Wolfer*, N. D., 24 N. W. (2d.) 690 (1945).

N. D. Rev. Code (1943) §35-0104 provides that: "a judgment which, in whole or in part, directs the payment of money," may be docketed and that: "judgment shall be a lien on all the real property, except the homestead, of every person against whom any such judgment is rendered, which he may have in any county in which such judgment is docketed at the time of docketing or which he thereafter shall acquire in such county, for ten years from the time of docketing the same in the county in which it was rendered." There is also a provision that: "The court may require either party to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by appointment of a receiver or by any other remedy applicable to the case. . ." N. D. Rev. Code (1943) §14-0525.

In *Gaston v. Gaston*, 144 Cal. 542, 46 Pac. 609 (1896), the court said, referring to a statute similar to North Dakota's, that a statute authorizing the court, in a divorce proceeding, to require the husband to give reasonable security for providing maintenance, and giving the court the power to enforce its order, should not be so construed as to abridge the equitable power of the court to make the maintenance a lien or charge upon the real estate of the husband.

"A lien is created by contract of the parties or by operation of law." N. D. Rev. Code (1943) §35-0104.

An example of a lien created by contract of the parties is found in *Gray v. Gray*, 24 N. D. 89, 176 N. W. 7 (1919), where the parties signed an agreement that the property of the husband should be incumbered by a lien in favor of the wife to secure the payment of alimony.

A majority of the state courts regard a decree for alimony as a debt of record in the same manner as any other judgment for money. Glenn, *Creditors Rights*, 1915 §71 n. 2, *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125 (1900), *Conrad v. Everick*, 50 Ohio St. 476, 35 N. E. 48 (1893). The judgment itself is a lien upon the real property of the debtor. *Hulbert v. Hulbert*, 216 N. Y. 430, 111 N. E. 70, L.R.A. 1916 D 661, Ann. Cas. 1917 D 180 (1916).

The case under discussion hinges on the power of the courts and their jurisdiction with regard to divorce decrees. "Jurisdiction in matters relating to divorce and alimony is conferred by statute, and the power of the courts to deal with such matters must find support in the statute or it does not exist." *Sate ex rel. Hagert v. Templeton ect.* 18 N. D. 525, 123 N.W. 383, 25 L.A.R. (N.S.) 234 (1909). Justice Burke, dissenting in *McLean v. McLean*, 69 N. D. 665, 290 N. W. 913 (1940), said, "there is no question but that the trial court in a divorce action has the power, when a divorce is granted, to make an equitable distribution of the property of the parties (14-0524) and to impress the property of a party to the action with a lien to enforce payment of the sums such party was directed to pay the other (14-0525)."

DEAN WINKJER.

BASTARDY—WHO MAY INSTITUTE PROCEEDINGS. A pregnant mother in consideration of a sum of money released the putative father from all liability for support and maintenance. The child, two years old, now sues the putative father for support and education and to have the release made between mother and defendant set aside. *Held*, neither common law nor the statutes of New York or New Jersey authorize a suit by the child

against the putative father. Defendant's motion to dismiss the complaint for lack of jurisdiction of the court granted. *Albanese v. Richter,* 67 F. Supp. 771 (1946).

A bastardy action is neither civil nor criminal but partakes of the nature of both. *State v. Lang,* 19 N. D. 679, 125 N. W. 558 (1910). While bastardy is not a crime, failure to support the child is made a crime in most jurisdictions and is prosecuted by the state.

The general rule is that a child does not have the right to sue in civil court. In North Dakota the child is not given the right to maintain the action. The mother, her legal representative, or a third person who has furnished an adjudged bastard necessaries may maintain the action. N. D. Rev. Code (1943) §§ 32-3603-04. The majority of the states reserve this right to the mother. Ala. Code (1928) § 3416; Ark. Dig. (1937) § 928; Colo. Comp. Laws (1921) § 6296; Conn. Gen. Stat. (1918) § 6006; Fla. Stat. (1941) § 742.01; Smith-Hurd Ill. Anno. Stat. Chap. 17 § 1; Ind. Stat. (1926) § 1049; Ky. Rev. Stat. (1944) § 406-020; Page's Ohio Gen. Code (1926) § 12110. Other states reserve this right of action to the officials of the town or county wherein the child is living. Ga. Code (1926), P. C. §§ 1330-36; Iowa Code (1939) § 12667.8; Mich. Comp. Laws (1929) § 12910; Okla. Stat. (1941) Tit. 10 § 54; Minn. Stat. Anno. (1947) § 257.18. The action may be brought in the name of a legal representative of the mother. Ariz. Code (1939) § 27-401; Del. Code (1935) § 3559; N. J. Rev. Code (1937) Chap. 9 § 16; N. C. Gen. Stat. (1943) § 49-50; Neb. Rev. Stat. (1943) § 13-111. Two states indicate that the action must be brought by the town where the child is living or is about to become a public charge. R. I. Gen. Laws (1938) Chap. 424 § 1; Tenn. Code (1932) § 11936.

States which have adopted the uniform act pertaining to bastardy allow an action by the mother, her representative, third persons furnishing support to the child, or by authorities charged with the support of the child. Iowa, Nevada, New Mexico, New York, North Dakota, South Dakota, Wyoming. See 9 U.L.A. Misc. Acts 389. But where the action has been commenced and the mother dies, at least one state declares the action is not abated but may be amended and brought in the name of the child and a guardian appointed. Kan. Gen. Stat. (1935) § 62-2310. But this cannot be construed to give the original right of action to the child, for that right is reserved only to the unmarried mother of the child. Kan. Gen. Stat. (1935) § 62-2301. Other states hold the mother must be unmarried, though some jurisdictions hold that a married woman may be the mother of a bastard child. *In re McNamara's Estate,* 181 Calif. 82, 183 Pac. 552 (1919); *State v. Liles,* 134 N.C. 735, 47 S.E. 750 (1904); *State v. Coliton,* 73 N. D. 582, 17 N. W. (2d) 546,156 A.L.R. 1403 (1945).

Statutory law having given a child the right to have an action brought for him to recover support and maintenance, it is interesting to note the history and development of this right. Under the oldest known code of laws, the Code of Hammurabi (2270 B. C.) there was no provision pertaining to the rights of a family, though there were laws governing contracts, torts, leases, carriers, agency and others. It did contain a law punishing a child with death if his father had caused the death of another. *Evolution of Law,* Kocourek and Wigmore, Vol. 1, p. 387, 409. Under the Hebrew Code (1000 B. C.) a child was not punished for an act of the father. Each person was liable for his own acts.

The laws of Gortyn (450 N. C.) provided that if a child born after divorce was sent to the father he could accept or reject the child. A rejection meant that the mother could rear the child or dispose of it by death without any penalty being inflicted upon her.

The rights of the child did not increase under the Romans. The Twelve Tables are silent concerning rights of the child. Under the Roman laws, however, *pater familius* could sell his child to slavery, or could control it completely, even to life or death. In this respect the Roman laws coincided

with the Code of Hammurabi. *Id.* p. 410. But gradually the power of the father began to diminish and children were given some rights. Though the common law did not recognize the right of a child to support from a putative father, *In re Zimmer*, 64 N. D. 410, 253 N. W. 749 (1934), this right has been recognized in all states by statute, and many states regard all children as legitimate. See Ariz. Code (1939) § 27-401.

It would appear, therefore, that an *infant nullius* is adequately protected under statutory law, and that there is no reason why he should be permitted to bring a suit in his own name against the putative father.

From a legal standpoint, the holding in *Albanese v. Richter, supra,* is logical and just. From a moral viewpoint it precludes unfairness.

HUGH McCUTCHEON.

CRIMINAL LAW—LARCENY—KLEPTOMANIA AS A DEFENSE. Judicial efforts to keep abreast of other fields of science, particularly medical science, have presented an interesting problem in jurisprudence in connection with the use of kleptomania as a defense to larceny. The defense has been interposed based upon the theory that kleptomania is a form of insanity.

The courts of the United States are divided as to the proper test which is applicable in general to the defense of insanity. The so called "right and wrong" test, as enunciated in *M'Naghten's Case*, 10 Clark & Finelly 200 (1843), has found favor in a number of American jurisdictions, including North Dakota, and is used by them as the sole test of insanity. *State v. Shippey*, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70 (1865); *State v. Throndson*, 49 N. D. 348, 191 N. W. 628 (1922). However, in certain other jurisdictions an additional test known as the "irresistible impulse" is applied. *Smith v. U. S.*, 36 F. (2d) 548, 59 App. D.C. 144, 70 A.L.R. 654 (1929); *Parsons v. State*, 81 Ala. 577, 2 SO. 854 (1886); 44 C.J.S. 20, sec. 2; *Vish. Crim. Law* (8th ed.) sec. 383b; 1 *Burdick, Law of Crimes*, sec. 213 (1946); 1 *Whart. Crim. Law* (10th ed.) sec. 44.

In *State v. McCullough*, 114 Iowa 532, 87 N. W. 503, 55 L.R.A. 378, 89 Am. St. Rep. 382 (1901), the accused was charged with larceny and defended on the ground that he was a kleptomaniac. The trial court gave instructions to the jury on insanity stating that if the acts were the result and offspring of insanity, the accused should be acquitted; if of avarice or greed, the accused should be convicted. This instruction was held to be erroneous on the ground that kleptomania is an irresistible desire to steal. The court, in discussing kleptomania, said: "It is a weakening of the will power to such an extent as to leave the afflicted one powerless to control his impulse to appropriate the personal property of others, without regard to whether such impulse is inspired by avarice, greed or idle fancy."

In other jurisdictions, where a similar problem has been presented, the courts have refused to apply the "irresistible impulse" test to kleptomania and continue to apply the "right and wrong" test. *Lowe v. State*, 44 Tex. Cr. 224, 70 S.W. 206 (1902); *State v. Riddle*, 245 Mo. 451, 150 S.W. 1044 (1912); 22 C.J.S. 129, sec. 61, note 95-96; (1936) 34 *Mich. L. Rev.* 569. The Texas court held that kleptomania is a defense to larceny only where it deprives the defendant of his sense of right and wrong; but if he is able to comprehend that the act is wrong, the mere irresistible impulse is insufficient. Hence, if it is shown that the defendant did have sufficient mental capacity at the time the act was committed to distinguish between right and wrong, kleptomania will not operate as a defense.

While an irresistible impulse must be more than mere absence of resistance or a theoretical rejection of free will, high medical authority states that an impulse may be truly irresistible, although the actor is