

words of the attestation clause and the signature. Probate was not sought in respect of the unattested addition.

HOOD, J.—I will grant probate as asked.

Motion granted.

[Proctors—Connelly and Crocker.] S. K. H.

Before Cussen, J. Nov. 15, Dec. 20, 1918.

In re BEATTY, Deceased.

**THE TRUSTEES, EXECUTORS AND AGENCY
CO. LTD. v. JOHNSTON.**

Intestacy—Inquiry as to next-of-kin — Legitimacy—Parents domiciled in New York—Children born out of wedlock—Subsequent marriage — Law of New York—Retrospective legitimation—Effect in Victoria—Reputed marriage—New York baptismal certificate—Effect as evidence — Statutes of Distribution—"Registration of Births, Deaths and Marriages Act 1915" (No. 2720), Part II.

In 1909 a Statute of the State of New York was passed conferring the status of legitimacy upon children born out of wedlock whose parents, domiciled in that State, intermarried before or after the passing of that Statute.

In the administration of an intestate estate in Victoria, an inquiry was directed to ascertain whether the intestate's brother, who died in New York in 1870, leaving children born prior to 1864 of a woman whom he had married in 1864, had left lawful issue.—

Held, that, as the Statute did not come into operation until after the brother's death, it could not be recognised in Victoria as legitimating the children for the purpose of the Statutes of Distribution.

Certificates of baptism issued under the law of the State of New York described the children named therein as being of the "lawful wife" of the man therein mentioned.—

Held, that the certificates were not evidence of anything but the fact and date of baptism.

Observations as to the evidence requisite for establishing a marriage by repute.

ORIGINATING SUMMONS.

Samuel Beatty died in Victoria in 1911 intestate, and letters of administration were granted to the Trustees, Executors and Agency Co. Limited. The Company took out an originating summons in 1916 for the determination of the question (*inter alia*) whether it should be presumed that William Beatty, a brother of the intestate, predeceased the intestate, and left no lawful issue, or whether further inquiries should be made. Anne Jane Johnston was made a defendant as representing certain next-of-kin living in Ireland. It had been ascertained that William Beatty, the brother, went from Ireland to America prior to or about the year 1860, and became domiciled in the State of New York, and that he was married there by a Protestant clergyman, in 1864, to Mary Anne Butler, and that she had borne children to him in the State of New

York prior to 1864. It was not known whether or not there had been a marriage between William Beatty and M. A. Butler prior to 1864. It was known that William Beatty was a Protestant, and Mary Anne Butler a Roman Catholic, and that William Beatty died in the State of New York in 1870. Upon this summons, Cussen, J., on July 20th, 1916, directed advertisements to be inserted in certain American newspapers relative to the children of William Beatty. In response to those advertisements, claims had been received from persons in the State of New York who were alleged to be children of William Beatty and Mary Anne Butler.

The plaintiff Company now sought further directions.

Davis for the Company.—The Court should assume a Roman Catholic marriage or a marriage by repute prior to 1864, or alternatively, should hold that the claimants acquired a status of legitimacy cognisable in Victoria, owing to the Domestic Relations Law, sec. 24, of the State of New York, passed in 1896, and consolidated in 1909, whereby children born out of wedlock were legitimated in that State retrospectively when the parents had afterwards married. Part II. of the "Registration of Births, Deaths and Marriages Act 1915" supports this view.

J. R. Macfarlan for the defendant Johnston.—No marriage prior to 1864 is, by repute or otherwise, sufficiently proved. The evidence of marriage in 1864 negatives the likelihood of any prior marriage. In Victoria legitimation must occur in the lifetime of the father, so that the status of legitimacy conferred in New York cannot be recognised here. For the purposes in Victoria of the Statutes of Distribution, the status conferred by the New York law is ineffective.

Curr. adv. vult.

CUSSEN, J., read the following judgment:—The plaintiff in this originating summons is the administrator of the estate of Samuel Beatty, deceased, who died in Victoria on 15th August, 1911, intestate, leaving a brother, two sisters, and some nephews and nieces as his next-of-kin. The defendant is one of the sisters. The originating summons was taken out principally to determine whether it should be presumed that William Beatty, a brother of the intestate, predeceased the intestate, and left no lawful issue him surviving, or whether further inquiries should be made. Thereupon I made an order on July 20th, 1916, that advertisements should be inserted in certain American papers, and it is fortunate that by this means, though the matters involved go back fifty or sixty years, information as to the intestate's brother, William Beatty, and his wife and children has been obtained which was not formerly in the possession of the administrator. There were several claims made, but they can all be disregarded except that one which is made on behalf of the children of William Beatty and Mary Anne Butler, afterwards Mary Anne Beatty, the wife of William Beatty. It appears from the affidavits that William

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Beatty knew Mary Anne Butler in Ireland, and was enamoured of her, that his family objected to this state of affairs, apparently because he was supposed to occupy a superior station in life, and because she was a Roman Catholic, while he was a Protestant; that between 1850 and 1860 she emigrated to America, that he followed her there, and living with her had several children, most, if not all, of whom were born before 1864; that prior to 1864 several of these children were baptised in the Roman Catholic Church, the mother being described as Mary Anne Butler, "lawful wife" of William Beatty; that in 1864 there was a ceremony of marriage between William Beatty and Mary Anne Butler in a Protestant church; that he died in 1870, and that she died shortly afterwards. The evidence is very vague as to the manner in which they lived prior to 1864. It is not even stated whether they were known as Mr. and Mrs. Beatty. It is not disputed that those of the children above-mentioned who were living at the death of the intestate would be entitled to a share in his estate if they were the legitimate children of William Beatty; but it is said that the evidence at present available does not establish that they are so, and indeed that the ceremony of marriage in 1864 suggests the contrary. No one has been joined as a party representing these children, but it was suggested by the plaintiff that as they were poor people living in New York, it might, before deciding whether a further party should be added or further evidence should be taken, be desirable that a question of law arising on the facts disclosed by the affidavits, should be determined, since the determination of it might render further expense unnecessary.

It was suggested that, even if William Beatty was never married to Mary Anne Butler before the births of the children, yet that, having regard to the law of the State of New York, their children should now be recognised as legitimate on the administration of the estate of an intestate who died domiciled in Victoria in 1911. It was agreed by the parties now represented that I might, so far as the law of New York is concerned, ascertain it for myself, and I have not found any difficulty in doing so. It may be shortly stated. Prior to the year 1895 or 1896 the law of the State of New York was that a child was not legitimate unless born in lawful wedlock, but about the time referred to a Statute was passed, which is still represented by a corresponding enactment, that all illegitimate children whose parents have married at any time, whether before or after the coming into the operation of the various Acts, should thereby become legitimate.

The present law appears to be contained in the Laws of 1909, Domestic Relations Law, sec. 24, which is as follows:—"All illegitimate children whose parents "have heretofore intermarried or who shall hereafter "intermarry shall thereby become legitimatised and "shall become legitimate for all purposes and entitled "to all the rights and privileges of legitimate children "but an estate or interest vested or trust created be-

"fore the marriage of the parents of such child shall "not be divested or affected by reason of such child "being legitimatised. Nothing in this article shall be "deemed or construed to in any manner impair or "affect the validity of any lawful marriage contract "made before the passage of this article." The law of 1896 was, so far as is material for the present purpose, expressed in similar terms.

The persons referred to as the "children" of William Beatty are, of course, now elderly people, but prior to and at the time of the birth of the eldest of the children, and ever since all parties, *i.e.*, father, mother and children, may be taken to have been domiciled and resident in and subject to the State of New York. It would therefore appear that in that State they would be held to be legitimate, since in the circumstances I have mentioned the Statute should, I think, be taken to apply to them. The question of law which I have mentioned is this. Assuming that the parents were not married before 1864, should their "children" now be recognised in Victoria, under the Statutes of Distribution, as the legitimate children of the intestate's brother. A reference to that Statute will show that it speaks of the "next of kindred to "the dead person in equal degree, and those who "legally represent them," and provides that "there be "no representations admitted amongst collaterals after "brothers' and sisters' children."

I have come to the conclusion that the question of law above-mentioned should be answered in the negative. My reason for so answering it is that I think, before persons can be considered "a brother's "children," or "a brother's representatives," within the meaning of the Statutes of Distribution the relationship of lawful children must have been established during the lifetime of the parents, or at all events of the father of the children. I do not decide that the status of legitimacy conferred in New York by the New York Statute would not be recognised in Victoria for any purpose, or that the Statute has no extra-territorial effect. For certain purposes, no doubt, legitimisation by Act of Parliament, which is to some extent the substitute for the old form of legitimisation, *per rescriptum*, will be recognised extra-territorially—*Cf. Gora v. Ciantar*, 12 App. Cas. 557; Dicey on *Conflict of Laws* (2nd ed.), p. 490; Phillimore on *Marital Law*, vol. IV., par. 542.

I have not overlooked the fact that the question above-mentioned must be determined by reference to the date of the death of the intestate, nor the fact that *In re Goodman's Trusts*, 17 Ch. D. 266, a wide meaning was given to the word "children." There has been a great difference of judicial opinion as to the correctness of this decision in two aspects, first, whether in an English Statute the English meaning should not be given to the word "children"—see Story, *Conflict of Laws* (8th ed.), note at pp. 142-151; and secondly, whether in deciding upon legitimacy the domicile of the father at the time both of the birth and the sub-

sequent marriage or other event conferring legitimacy, or only his domicil at the later time need be taken into account—*Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Westlake* (4th ed.), p. 98. I do not wish to be taken as expressing any opinion on these matters, but merely say that all the cases, including those above-mentioned, make the domicil of the father at some time the crucial test—see, also, *Irving v. Ford*, 97 Am. St. Rep. 447, 183 Massachusetts 448; *Miller v. Miller*, 91 N.Y. 315. It may be suggested that, where the father is alive at the time the status of legitimacy is conferred, his domicil affords a connecting link determining the status of all the children who might be affected by the event which confers legitimacy, even though they or some of them, having become adults, have acquired domicils or a domicil different from that of the father. This aspect of the matter does not, however, seem to have arisen in any of the English cases, the contingency of the so-called children being elderly people with a different domicil not having occurred. But where, as here, the status of legitimacy was not conferred during the father's lifetime, his domicil cannot, I think, for the present purposes in Victoria, be used as a connecting link, and if the "children" in this case were domiciled in or subject to countries other than the State of New York, it would be difficult to hold that the status of legitimacy was conferred on them because their father when he died was domiciled in New York. I can see that it is possible that what in a sense is a retrospective operation may be given in the State of New York to the Statute, and of course in this case the "children," and the father in his lifetime were domiciled in that State, but these considerations do not lead me to alter my opinion. In a valuable note to *In re Ingram*, 12 Am. State Reports 80, after a full examination of the authorities, it is stated (at p. 103)—"The better opinion is, we think, that where an illegitimate child is made legitimate in any mode sanctioned by the laws of the state or country in which it and its parents at the time reside, its status of legitimacy becomes thereupon established."

We have, it is true, in Victoria a provision for legitimation contained in Part II. of the "Registration of Births, Deaths and Marriages Act 1915," but it is of such a different character to the provision for legitimising or legitimating in New York, that it can have no bearing on the present case. In any event, a modern provision of that kind should not, I think, be held to affect the meaning of the word "children" in an ancient British Statute in force in Victoria by 9 Geo. IV., c. 83. It may be noticed that a contrary view to what I have expressed would result in this, that if William Beatty died intestate, these "children," if not legitimate, would not in 1870 have succeeded to his estate. It would be odd, on that assumption, if as his children they obtained a share in his brother's estate by reason of subsequent legislation.

The question will therefore have to be decided whether anything further is to be done before giving a final decision as to the claims of the children of William Beatty. They, or some of them, have a legal adviser in New York, and I am disposed to ask the plaintiff to communicate with that gentleman to ascertain whether one of them wishes to be added as a representative party, or whether they wish to submit further evidence on the question whether a marriage prior to 1864 should be found. If one of them was made a party he could indicate whether he wished to have further argued the question of law above-mentioned, or any other question, and if after hearing argument the question or questions was or were decided against him, he might appeal. On the present materials, the question whether there was a marriage prior to 1864 is left in a vague and unsatisfactory state. The certificates of baptism which I mentioned, though they refer to "the lawful wife," are, in the absence of further evidence, not admissible to prove anything but the fact and date of baptism—*Blackburn v. Crawfords*, 3 Wallace 175; but, on the other hand, there is a strong presumption in favour of marriage and legitimacy—see *Piers v. Piers*, 2 H.L.C. 331; *Caujolle v. Ferrie*, 23 N.Y. at 108; *In the Matter of Matthews*, 153 N.Y. 443; and the cases cited in *In re the Estate of L.*, 24 A.L.R. 404. It must be remembered, too, that in the State of New York there might in 1850 to 1864 be a valid marriage, though it was not formally solemnised before a magistrate or a minister of religion. A present agreement to become husband and wife, at all events, if followed by sexual intercourse, was sufficient, and the solemnisation before a magistrate or a minister was only required for purposes of regulation—*Hayes v. The People*, 25 N.Y. 390; *Gall v. Gall*, 114 N.Y. 109. Even the fact that there was solemnised a marriage in 1864, though of importance, does not necessarily show that there was not a previous marriage in another church (the parties having strongly divergent religious views), or a previous marriage *per verba de praesenti cum copula*, the married state being evidenced by cohabitation and recognition—*Shedden v. Patrick*, 1 Macq. 535 at p. 646.

In *Piers v. Piers*, 2 H.L.C. 331 at p. 371, Lord Brougham said, in 1849—"It is a constant course with people who solemnise irregular marriages, which though irregular are perfectly valid, and perfectly legal, and against which nothing either of presumption or of law can be alleged; it is a constant course for them afterwards, needlessly, superfluously, and in my opinion irregularly, to solemnise what is called a regular marriage *in facie ecclesiae*. . . Therefore, though I do not consider that that acting of theirs is at all to be commended, yet it is constantly had recourse to. It is a constant course for persons in a certain station of life who make what is called a runaway or irregular marriage, afterwards to marry *in facie ecclesiae* for the purpose of quieting

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"the scruples of persons of nice conscience, but also
"for the purpose of pulling down any public clamour
"that may have arisen."

I do not propose at present to discuss further this question or finally to decide it. I should like to hear the views of the parties as to what is best to be done having regard to the intimation I have given that the representative of the children in New York should be further communicated with. For example, the present defendant may wish to cross-examine in New York any witness or deponent residing there. I greatly regret that with respect to a share which is not very large in amount there should be further expense, but I do not think it would be well to decide the matter on the present materials. The claimants in New York are all adults, and possibly some way might be suggested by which the persons interested might effect a compromise, rather than have a great part of the share disappear in the expenses of further inquiry and further legal proceedings.

The matter was ordered to stand over.

Order accordingly.

[Solicitors—For the plaintiff, C. H. Lucas; for the defendant, P. D. Phillips Fox and Overend.]

S. K. H.

Before Hood, J.

February 3.

In re O'HANLON. Ex parte COLLINS.

Local Government — Councillor — Election of—Postal ballot-papers—Irregular issue of—Avoidance of election—“Constitution Act Amendment Act 1915” (No. 2632), Part V., Division 13—“Local Government Act 1915” (No. 2686), sec. 148.

At a municipal election to which voting by post had been made applicable, the whole of the postal ballot-papers used had been irregularly issued by the Returning Officer, and all the postal votes recorded were consequently bad. The rejection of the whole of the postal votes, however, would have left with a majority of votes the same candidate as had a majority when the postal votes were included.—

Held, that, notwithstanding this latter fact, the election should be declared void, it being impossible to determine what the result of the election would have been if regularly conducted.

ORDER NISI.

On August 22nd, 1918, in the Shire of Numurkah, an election of a councillor for the Moira Riding of the municipality was held, under the provisions of the "Local Government Act 1915." The candidates were Patrick Denis Kavanagh O'Hanlon and James Ross. After the polling, the Returning Officer, Malcolm Douglas McLean, declared that 161 votes had been recorded for each candidate, and that the voting being equal, he recorded his casting vote in favour of Patrick Denis Kavanagh O'Hanlon, and declared him elected. The personal votes were 128 for O'Hanlon and 113 for Ross. The postal votes were 33 for O'Hanlon and 48

for Ross. O'Hanlon took his seat and acted in the office of councillor, and John Collins, a ratepayer in the riding, applied for an order *nisi* to oust him from his office, on the ground that irregularities had occurred in relation to the postal votes. Pursuant to the power given by the "Local Government Act 1915," sec. 148, the provisions of the "Voting by Post Act 1900" were, by Order in Council, made applicable to elections in this municipality, such provisions now being incorporated in the "Constitution Act Amendment Act 1915," Part V., Division 13. It appeared upon affidavit that, prior to the election, the Returning Officer handed to each of the candidates several forms of application for postal ballot-papers, and also ballot-papers initialled by him, and the candidates distributed these ballot-papers without applications therefor being lodged with the Returning Officer, and votes were recorded and counted at the election upon such ballot-papers. These postal voters did not make application in proper form, nor to the proper person under the "Constitution Act Amendment Act 1915," sec. 271 (1), and the Returning Officer did not act in accordance with secs. 273, 275 and 276, and in one postal ballot-paper thus supplied O'Hanlon had written in his own name as the candidate to be voted for thereon. The Returning Officer stated upon affidavit that he had issued the postal ballot-papers in the way described because the candidates promised not to dispute the result of the election.

An order *nisi* was granted by Hood, J., on the ground that the provisions of Part V., Division 13, of the "Constitution Act Amendment Act 1915," and of the regulations pursuant to the "Voting by Post Act" were not observed.

Dixon for the relator to move the order absolute.

Hassett for the respondent to show cause.—The election should not be set aside, as it is clear that, even if all the postal votes were rejected, there would still be a majority for O'Hanlon.

HOOD, J.—In this case, the election was conducted in a manner which is admitted to have been grossly irregular. Ballot-papers for votes by post are intended to be applied for by the electors themselves, and they must satisfy the Returning Officer that they are not able to be present through some reason; and, on his being satisfied, he may allow them to vote. Instead of that, the Returning Officer here appears to have given postal ballot-papers to the candidates to do as they pleased with them, and that being so, it was a gross irregularity. The whole of the votes by post are admittedly bad, and the question is, what I should do with the election. I intend to make the order absolute simply on the ground that it is impossible to say what was the effect of this error. But if these voters had been told that they could not vote by post, but must give their votes in the ordinary way, or must apply in the prescribed way, and satisfy the Returning Officer that they could