Legitimacy or Legitimation and Succession in the Conflict of Laws

JOHN D. FALCONBRIDGE
Osgoode Hall Law School

1. The *Bischoffsheim* case
2. Status and capacity or incidents of status
3. The scope of succession law
4. A child born in lawful wedlock
5. A child of a putative marriage
6. A child of a polygamous marriage
7. A child legitimated by the subsequent marriage of his parents
8. A child legitimated by his father's recognition
9. An adopted child

1. *The Bischoffsheim Case*

The decision of Romer J. in the case of *In re Bischoffsheim*[1] has already been the subject of several critical, even devastating, comments,[2] in which most, if not all, of the relevant English cases have been reviewed. This wealth of unfavourable comment might at first sight seem to render any further observations superfluous, but it seems to me that the course of reasoning of the learned judge so completely ignores or confuses certain distinctions which are fundamental in the conflict of laws that it is worthwhile to attempt to restate some of those distinctions, and

[1] *In re Bischoffsheim; Cassel* v. *Grant*, [1948] Ch. 79, [1947] 2 All E.R. 830. The judgment was delivered on November 26th, 1947.

[2] Morris (1948), 12 Conveyancer and Property Lawyer 223; Mann, Legitimacy and the Conflict of Laws (1948), 64 L.Q. R. 199; Dicey, Conflict of Laws (6th ed. 1949) 489 ff., 501, 514. The special editor of this portion of Dicey, R. S. Welsh, had already in his earlier article, Legitimacy in the Conflict of Laws (1947), 63 L.Q. R. 65, made a valuable contribution to the elucidation of some of the phases of the subject of the present article. See also Mann, Legitimation and Adoption in Private International Law (1941), 57 L.Q. R. 112; Taintor, Legitimation, Legitimacy and Recognition in the Conflict of Laws (1940), 18 Can. Bar Rev. 589, 691.

to discuss the *Bischoffsheim* case and the earlier case law within the framework of those distinctions.[3]

The facts of the case and some features of the judgment may conveniently be stated here by way of general introduction. In 1908 Nesta Fitzgerald married Lord Richard Wellesley, son of the fourth Duke of Wellington, and two daughters were born of this marriage. Lord Richard was killed in action in 1914, and in 1917 his widow, in New York, married his brother Lord George Wellesley. The only child of this marriage was Richard Wellesley, born in 1920, and the question to be decided was whether he was entitled to claim under the will of his mother's grandfather Bischoffsheim. The grandfather had died in 1908, having devised and bequeathed his residuary real and personal estate to trustees "on the usual trusts for sale and conversion" for the benefit, as to one share, of his granddaughter Nesta for life with remainder to such of her children as being male should attain the age of 21 years or being female should attain that age or marry. Nesta died in 1946. The law governing the succession to Bischoffsheim's estate was, or was assumed to be, English law.

The marriage of a woman with the brother of her deceased husband was in 1917 void by the domestic law of England.[4] The domicile of origin of both Nesta and Lord George Wellesley was English, and if they were still domiciled in England at the time of their marriage, the marriage was also void by the conflict rules of the law of England, notwithstanding that the marriage was celebrated in New York.[5] Romer J. is reported as saying that the marriage was "unimpeachable by the law of New York", but the report is defective in that it contains no note as to the evidence, if any, of a New York lawyer on this point, and we are obliged to conjecture what the learned judge meant. He may have meant merely that the marriage was not prohibited by the domestic law of New York. It may be, however, that by the conflict rules of the law of New York the marriage would be void, even though celebrated in New York, if the parties were domiciled in England at the time of the marriage.[6] Romer J.

[3] The title of the present article is intended to cover questions not only of original legitimacy but also of subsequent legitimation and the related but separate questions of succession in the conflict of laws.

[4] The law of England was changed in this respect by the Deceased Brother's Widow's Marriage Act, 1921, and a similar change was made in the law of Canada in 1923. The marriage of a man with the sister of his deceased wife was made valid in Canada in 1882, and in England in 1907. As to the present law of Canada, see the Statutes of Canada, 1932, c. 10.

[5] *Brook* v. *Brook* (1861), 9 H.L.C. 193, 5 R.C. 783; *In re De Wilton*, [1900] 2 Ch. 481; *In re Bozelli's Settlement*, [1902] 1 Ch. 751.

[6] Conflict of Laws Restatement (1934) s. 132; 2 Beale, Conflict of Laws (1935) 687; Goodrich, Conflict of Laws (3rd ed. 1949) 356ff.

refrained from deciding the question (which was argued before him) whether the parties had acquired a domicile of choice in New York at the time of the marriage. If they had done so, the marriage would have been valid by the law of the domicile of the parties and therefore valid in England. Romer J. may possibly have meant that the marriage was voidable, not void, by the law of New York, and that the marriage had become "unimpeachable by the law of New York" on the death of one of the parties, on the assumption that there was no statute corresponding with Lord Lyndhurst's Act (the Marriage Act, 1835) which in England declared marriages within the prohibited degrees of consanguinity or affinity void *ab initio*. This meaning of the learned judge's phrase is, however, excluded on any finding as to the domicile of the parties at the time of the marriage. If the parties were domiciled in England at that time the domestic law of England (including Lord Lyndhurst's Act) would be applicable, and the marriage would be void *ab initio*. If the parties were domiciled in New York at the time of the marriage, the domestic law of New York would be applicable, and the marriage would not be either void or voidable, but would be valid.

On the question of domicile, this is what Romer J. says:

> . . . the evidence plainly discloses that it was the definite aim both of Lord George Wellesley and of his bride to relinquish their domicile of origin and acquire an American domicile of choice before the marriage was celebrated. Whether or not they succeeded in doing so was one of the subjects discussed before me. Whatever be the truth of that matter, however, it was fairly and rightly conceded by counsel for the children of the first marriage that Lord George and his wife had unquestionably acquired a domicile of choice in New York by the time their son was born there in June, 1920. From this fact sprang a different way of founding Mr. Wellesley's claim to share in the testator's estate, and I propose to consider this aspect of the matter first.

Finally, having decided that the claim could be based solely on the domicile of the parents at the time of the birth of their son, he adds:

> The conclusion which I have formed and expressed on the legitimacy at birth of Mr. Wellesley relieves me of the necessity of inquiring into the domicile of his parents at the time of their marriage in New York. The question is one which is not altogether easy of solution, and I will express no concluded opinion on it.

Incidentally it may be observed that the intention (*animus manendi*) that must accompany residence in order to effect a change from a domicile of origin to a domicile of choice is an intention with regard to residence, not an intention with regard

to domicile. In other words, if a person has abandoned the country of his domicile of origin, and has begun to reside in another country, and intends to reside permanently or indefinitely in the latter country, he has acquired a domicile of choice there, and it is immaterial whether he intends to retain his old domicile or to acquire a new one.[7]

If Romer J. had not deliberately refrained from stating any conclusion on the question of the domicile of the parties at the time of the marriage, and had found that they were domiciled in New York at that time, the result of the case would have been clear. The validity of the marriage and the legitimacy of the claimant would have been governed by New York law. The claimant would have been born in lawful wedlock and would have been entitled to succeed under the English law of succession. There being no finding as to the domicile of the parties at the time of the marriage, however, the decision in favour of the claimant was necessarily based on the theory that, even if the marriage was invalid by English law (including English conflict of laws), the claimant was legitimate by the law of New York, by virtue of his parents being domiciled there at the time of his birth, and *therefore that the claimant was entitled as a legitimate child under a will and in a succession governed by English law.* The italicized words indicate the conclusion which, it is submitted, is wrong; and, leaving the *Bischoffsheim* case for the moment, I propose now to discuss the broader proposition that a person may be a legitimate or legitimated child under the law of one country, but may not be entitled as successor on death under the law of another country.[8]

2. *Status and Capacity or Incidents of Status*

In an article on Status and Capacity[9] C. K. Allen discusses the treatment of status by Savigny, Austin, Maine, Holland and Salmond, and defines status as the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both. With especial reference

[7] *In re Annesley*, [1926] Ch. 692.

[8] In my Essays on the Conflict of Laws (1947) I attempted in a piecemeal fashion to discuss various distinctions between questions of the law or laws relating to succession on death, marriage, status, legitimacy and legitimation, including the distinction between the status of a person and his claim to succeed to property (pp. 78–82, 458, 459), status depending on the validity of a marriage or of a divorce and therefore governed by the law of marriage and divorce, not by the law of status (pp. 102, 104, 165), but did not precisely or in an adequate fashion discuss the subject of the present article.

[9] (1930), 46 L.Q.R. 277–310.

to private international law, he submits (p. 293) that most of the confusion which surrounds the subject of status arises from the fact that the two terms "status" and "capacity" have not been sufficiently differentiated in meaning. In effect, a question of status, which involves deciding whether a particular person is a member of a particular class of persons, is different from a question of capacity or incapacity, which involves deciding whether a particular person is capable or incapable with regard to a specific transaction, although a court may in the same case have to decide a question of status, and a question of capacity or incapacity flowing from that status.

Allen (p. 297) approves of rule 138, as it appears in the fourth edition (1927) of Dicey, Conflict of Laws, reproduced in the fifth edition (1932): "In cases which do not fall within rule 136, the existence of a status existing under the law of a person's domicil is recognized by the court, but such recognition does not necessarily involve the giving effect to the results of such status".[10] Rule 138 has now become rule 113 in the sixth edition (1949) of Dicey, with a reference to new rule 111, instead of old rule 136. On the other hand Allen (p. 307) criticizes Dicey's old rule 136 on the ground that it confuses status and capacity. Rule 136, as it appears in the fourth and fifth editions of Dicey, is as follows: "Transactions taking place in England are not affected by any status existing under foreign law which either (1) is of a kind unknown to English law, or (2) is penal". The point of Allen's criticism is that rule 136, in stating exceptions to the recognition of a status created under a foreign domiciliary law, should be confined to the recognition of the existence of the foreign status, leaving to rule 138 the question of the effect to be given in England to the "results" of such status. In the sixth edition of Dicey, the editors have rightly omitted from new rule 111 any reference to a foreign status "of a kind unknown to English law", because Dicey was clearly in error in thinking that a foreign status of this kind would not be recognized in England,[11] but they did not take advantage of the opportunity to meet Allen's criticism with regard to rule 136. They might well have changed new rule 111 to read simply: "A status existing under a foreign law is not recognized in England if it is penal." It should be noted that in the sixth edition of Dicey, the editors, in their comment on new rule 111, say: "The most fruitful method

[10] Allen's observation (p. 297) that rule 138 "cuts most of the ground away from rule 158, which adopts the Savignian principle" has lost its point because rule 158 now appears in an entirely new form in new rule 139.

[11] Dicey, Conflict of Laws (6th ed. 1949) 467.

of approach is perhaps to distinguish status from capacity",[12] and in their comment on new rule 113[13] they admit that their view as to the meaning of the rule "comes very near" to Allen's opinion that a distinction ought to be made between "the existence of a status" and "the legal results or effects of it", and that "while the existence of the status ought to be determined wholly by the law of the person's domicile, the extent to which effect should be given in other countries to the results of such status . . . depends upon other laws". They are, however, unduly apologetic in defending their view merely as being "a kind of practical compromise", most nearly corresponding with the actual practice of English courts, but, "as a speculative view, obviously open to criticism". It is submitted that "the practical compromise" is also theoretically justifiable.

In modern judicial dicta the high water mark of confusion between status and capacity is reached by Scott L.J.'s statement of the universality of status and its incidents in *In re Luck's Settlement Trusts*,[14] now supplemented by the decision of Romer J. in the *Bischoffsheim* case;[15] while against this may be set the statement of Lord Greene in the *Baindail* case[16] that it would be wrong to say that for all purposes the law of the domicile is necessarily conclusive as to capacity arising from status. On the other hand, as regards the existence of a status, apart from its incidents, it is clear that as a general rule the governing law by English conflict of laws is the law of the domicile. That law is, however, not necessarily the law of the domicile of the person whose status is in issue: for example, if the question is whether a child has been legitimated, the governing law is the law of the father, not that of the child. If the governing law is a foreign law, the creation of the status by that law should under English conflict of laws be recognized in England as an existing status provided that it is not of a penal character or that the recognition of its existence is not contrary to English public policy.

Consistently with Allen's definition of status the existence of a status by the law which creates it involves the attribution by

---

[12] *Op. cit.*, p. 466, citing Allen's article; Cheshire, Private International Law (3rd ed. 1947) 256, 257; Falconbridge, Essays on the Conflict of Laws (1947) 600; Welsh, in (1947), 63 L.Q. R. at pp. 73 ff.

[13] *Op. cit.*, pp. 472, 473.

[14] [1940] Ch. 864, at pp. 888 ff., and especially p. 894; cf. Welsh (1947), 63 L.Q.R. 65, at p. 75, approving my criticism, (1941), 19 Can. Bar Rev. 43, now reproduced in Essays on the Conflict of Laws (1947) 599, 600. The *Luck* case is discussed in § 8, *infra*.

[15] Discussed in § 1, *supra*, and § 4, *infra*.

[16] [1946] P. 122, at p. 128. The *Baindail* case is discussed in § 6, *infra*, with quotation of other passages from Lord Greene's judgment.

that law to a person having the status of peculiar capacities or incapacities or both. In other words, the alleged status must have incidents attached to it, otherwise it is not really a status, but is merely a "relation without content" or a status in the abstract. Questions may arise in country X with regard to a status alleged to be created by the law of Y, namely, (a) whether by the conflict rules of the law of X the existence of the status is recognized in X, and (b) whether by the conflict rules of the law of X effect is given to the incidents which are attached to the status by the law of Y or to other incidents defined by the law of X. Even if the question arising in X is of the former class, namely, as to the recognition in X of the existence of the foreign created status, and even if the law of X will not give effect in X to the incidents attached to the status by the law of Y, those incidents may be of some interest to the law of X. Especially if the foreign status is of a kind unknown to the domestic law of X, or if the analogy or similarity of the foreign status to some status known to the domestic law of X is not clear, a knowledge of the incidents which are attached to the status by the law of Y may be useful in defining the nature of the status or in identifying it as analogous or similar to some status known to the domestic law of X. In any event, the recognition in X of the existence of the status created by the law of Y and the giving effect to its incidents are separate questions, so that, for example, a person may have the status of legitimate or legitimated child and, as an incident to that status, be entitled to claim in the character of child by the law of Y, and be recognized as a legitimate or legitimated child in X, and yet not be entitled to claim under the succession law of X because he is not within the definition of child in that law.[17]

3. *The Scope of Succession Law*

The topic for discussion in the present article is one phase of the distinction between status on the one hand and the incidents of status or capacity on the other hand, that is, specifically,

[17] My reading of Taintor's article (note 2, *supra*) has suggested some of the statements in this paragraph, but I do not mean to charge him with responsibility for the paragraph as a whole. The article itself contains an acute and extensive review of the cases decided both in England and in the United States. The American cases present a great variety of situations, and the author makes many judicious observations as to the social desirability of certain solutions. As to the distinction between recognizing the existence of a foreign status and giving effect to the incidents attached to the status by the foreign law, see also Robertson, Characterization in the Conflict of Laws (1940) 144–145 (cf, The "Preliminary Question" in the Conflict of Laws (1939), 55 L.Q.R. 565, at pp. 573, 574).

the distinction between the status of a person and his right of succession on death, or, stated more narrowly, the status of a person as a legitimate or legitimated child, and, as a separate question, his right of succession in that character.

Let us suppose that *A* has died intestate, or that *A* by his will has given a share of his estate to a child of *A* or to a child of *B*, without identifying such child by name or otherwise manifesting his intention that a particular child is to take even though he is not within the ordinary definition of child in the proper succession law.[18]

A "child" may of course have different meanings in different laws, and whether a child under the law of one country is entitled as successor on death under the law of another country are separate questions. It seems desirable therefore at this point to attempt to indicate exactly the scope of the law of succession in its relation to the meaning of child, as distinguished from the scope of the law of status in its relation to the meaning of child. It may frequently happen that these two laws are the laws of different countries, as, broadly speaking, the proper law of succession is either the personal law of the deceased owner as regards movables, or the law of the situs of the assets of his estate as regards land, whereas the proper law of a person's status is either his personal law or the personal law of his parents or one of them.

The scope of the law of succession should include for the purposes of the present discussion the definition of the classes of persons entitled to take on intestacy, including the definition of child, and provisions as to the share or shares to which a child or children is or are entitled; and if there is a will, the validity of the will, and limitations on the disposing power of the testator as regards the share or shares to which a child or children is or are entitled, and the definition of child in the will.

It is conceivable that the proper law of succession, say the law of *X*, may define a child as including some or all of the following:

(1) *A legitimate child;*

(a) A child born in lawful wedlock, in the sense of being born during the valid marriage of his parents or within a reasonable period after the dissolution of the marriage by a valid divorce or by the death of the husband,[19]

[18] Cf. Dicey, Conflict of Laws (6th ed. 1949) 504, note 31.

[19] As regards the presumption of legitimacy in the case of a child conceived before, but born after, the marriage, or conceived before, but born after, the divorce, see Dicey, Conflict of Laws (6th ed. 1949) 487, note 39.

(b) A child of a putative marriage,
(c) A child of a polygamous marriage,

(2) *A legitimated child;*

(d) A child legitimated by the subsequent marriage of his parents,
(e) A child legitimated by his subsequent recognition by his natural father,

(3) *An adopted child.*

The foregoing classes of children will be discussed *seriatim* in the following sections, and the problem which is the main subject of this article will arise if a person is a child of a certain class under the law of his domicile of origin or of the law of the domicile of his father, say the law of *Y*, but a child of that class is not within the definition of child under the law of *X*.

It is even conceivable that a person may not come within any of the foregoing classes of legitimate, legitimated or adopted children by the law of *Y*, and may nevertheless have some rights of succession under the law of *X*, because by that law, for example, an illegitimate child may be entitled to a share in his father's estate.[19A] In other words, a person may have the status of a legitimate, legitimated or adopted child, or may lack that status, by the law of *Y*, but if he is claiming in the character of child under the succession law of *X*, the question always is whether he is within the definition of child by the law of *X*.

4. *A Child Born in Lawful Wedlock*

It may be assumed that by the succession law of any country a child born in lawful wedlock is entitled to claim as successor in that character either under a gift to a child in a will or on intestacy. In one famous English case, *Birtwhistle* v. *Vardill*,[20] it was indeed held that as regards land situated in England and for the purpose of succession to real property on intestacy it was only a child born in lawful wedlock who was entitled to

[19A] Cf. *Moorhouse* v. *Lord* (1863), 10 H.L.C. 272, in which Mrs. Colvin contended that her father, Dr. Moorhouse, was domiciled in France at the time of his death, with the result that by French law, the proper law of succession as regards movables, his daughter would be entitled to a share of the undisposed residue even if the court found that her parents' marriage was invalid and that she was therefore illegitimate. The court found against her, however, on both points, that is, that her parents' marriage was invalid and that her father's domicile at the time of his death was Scottish, not French.

[20] (1840), 7 Cl. & F. 895, 51 R.R. 139, 5 R.C. 748. For further discussion, see § 7, *infra*.

claim, and specifically that a child born before the marriage of his parents but legitimated by their subsequent marriage under the law of the foreign domicile of the father, was excluded from the succession. The legitimation of the child was recognized in England under English conflict of laws, but nevertheless he was not a child within the definition of child in the relevant succession rule of the law of the situs of the land. The case is mentioned here merely as a striking example of the principle that a child may be a legitimated child under the law of one country and nevertheless not entitled to claim as successor under the law of another country. If the land had been situated in Scotland, instead of England, the definition of child in the proper succession law would have included a child legitimated by the subsequent marriage of his parents under the law of the foreign or domestic domicile of his parents, as was taken for granted in the Scottish case of *Udny* v. *Udny*.[21]

The discussion of the legitimation cases being postponed for the present, the English cases relating to the claim of a person as successor in the character of a legitimate child, that is, legitimate from birth, must first be considered. These cases generally involve simply the question whether the claimant's parents were validly married at the time of the child's birth, it being generally assumed or decided that the child was entitled as successor in English succession law if he was born in lawful wedlock, but not otherwise.

The leading case with regard to a marriage alleged to be void on the ground that the parties are within the prohibited degrees of consanguinity or affinity is *Brook* v. *Brook*,[22] decided by the House of Lords on appeal from a decision of Stuart V.C., assisted by Cresswell J.,[23] in an administration suit. *A* by his will gave a certain interest in his estate to "my reputed son" *C*, "commonly so called". Soon after *A*'s death *C* died intestate and without leaving issue. The Crown claimed the property as *bona vacantia*, on the ground that the marriage of *C*'s parents was void, and therefore *C*, being illegitimate, could have no collateral relatives. *C*'s sisters and half-brother and half-sister claimed the property on the ground that the marriage was valid and that *C* was legitimate and that they were the next of kin. Both parties to the marriage were domiciled in England at the time of its celebration in the Duchy of Holstein in the Kingdom of Denmark.

[21] (1869), L.R. 1 H.L. Sc. 441, 9 R.C. 782.
[22] (1861), 9 H.L.C. 193, 131 R.R. 123, 5 R.C. 783; S.C., 4 L.T. 93 (N S), 38 L.T. 93 (O.S.).
[23] (1858), 27 L.J. Ch. 401, 31 L.T. 91 (O.S.).

When the marriage was celebrated, on the 9th June, 1850, the marriage was void by the domestic law of England, because the woman was the sister of the deceased wife of the man, and the marriage was void by English conflict rules because of the parties' English domicile, notwithstanding that it was celebrated in Holstein and that by the domestic law of Holstein the marriage was valid (though it may have been void by the conflict rules of the law of Holstein in view of the English domicile of the parties). As Welsh has pointed out[24] the question whether, notwithstanding the invalidity of the marriage, the child might be legitimate by the law of his domicile of origin was not raised, and if it had been, the result would have been the same because the parents' domicile at the time of the child's birth appeared to have been English. His legitimacy was therefore necessarily based on his being born in lawful wedlock.

The next case to be considered is *In re Paine*,[25] a decision of Bennett J., which is important on the question of the validity of a marriage between parties, one of whom is within, and the other is outside, the prohibited degrees of consanguinity or affinity, by the law of his or her domicile. Read along with *Mette* v. *Mette*,[26] the result is that unilateral incapacity is fatal to the validity of the marriage, whether the incapacity is that of the man or that of the woman, but there is of course some older authority in favour of the extremely insular view that unilateral incapacity is fatal to the validity of a marriage only if the incapacity is created by a prohibition of English law, and that at least in the case of a marriage celebrated in England effect will not be given to the incapacity created by the law of the foreign domicile of one of the parties.[27]

This is not the place for further discussion of this question of marriage law. For the purpose of the present article a much more important point is that *In re Paine* is an unequivocal authority[28] on what Welsh calls the "crucial issue",[29] namely,

[24] *Op. cit.* (note 2, *supra*) at p. 80. On the same page Welsh points out that the case of *In re De Wilton*, [1900] 2 Ch. 481, also, is inconclusive on the same point, though it is clear from the judgment that the court applied the English law of succession as such, without reference to the law of the domicile of origin of the children.

[25] *In re Paine, In re Williams*, [1940] Ch. 46. For my comment on the case, see (1940), 18 Can. Bar Rev. 220, reproduced in Essays on the Conflict of Laws (1947) 632 ff. See also comment (1940), 56 L.Q.R. 22.

[26] (1859), 1 Sw. & Tr. 416.

[27] Dicey, Conflict of Laws (6th ed. 1949) 784 (Exception 1 to Rule 169), citing, *inter alia*, *Sottomayer* v. *De Barros* (no. 2) (1879), 5 P.D. 94. *In re Paine* is cited in Dicey at pp. 760, 762, 779, 782, 783, 785.

[28] That is, in its result, the point not being specifically discussed by Bennett J.

[29] *Op. cit.* (note 2, *supra*) at p. 80.

that in a case in which the proper succession law is English, a child who is illegitimate by that law is not entitled as successor even though by the law of his foreign domicile of origin he is legitimate. *A* (Mrs. Paine), a woman domiciled in England, by her will directed that a sum of money should be held by her trustees for her daughter *B* (Mrs. Toepfer) with a gift over if *B* should die without leaving any child or children her surviving. In 1875, at Frankfurt on Main in Germany, *B* had married a man, domiciled in Germany, formerly the husband of *B*'s sister, who had died in 1872. By the domestic law of the husband's domicile the marriage was valid, and by the then domestic law of England (*B*'s domicile), the marriage was invalid. Of three children of this marriage one, *C*, survived *B*. Bennett J., having decided that the marriage was invalid by English conflict of laws, held that *C* was illegitimate and was not a child of *B* within the terms of *A*'s will, and that the gift over was effective.

In the *Paine* case Bennett J. apparently assumed that he was not concerned with the question whether *C* was legitimate by the law of her domicile of origin. The case, as Welsh mentions,[30] presents in concrete form the logical difficulty of referring a child's legitimacy to the law of the domicile of origin. The father was domiciled in Germany, and the mother, if the marriage was invalid, presumably retained her English domicile, she never having lived with the father in Germany. The child's domicile of origin therefore was German if she was legitimate and English if she was illegitimate, and it is "thinking in a circle" (in Westlake's phrase) to refer the child's legitimacy to the law of his domicile of origin, since that domicile cannot be determined before it is decided whether or not he is legitimate.[31] It may be added that in the *Paine* case the father was a German national, so that not only by domestic German law, but also by German conflict of laws *C* was legitimate.

It is time now to return to the case of *In re Bischoffsheim*,[32] the facts of which have been stated at the beginning of the present article. Without mentioning *In re Paine*, Romer J. held that, notwithstanding the invalidity of the marriage of Richard Wellesley's parents by English domestic law and English conflict of laws,[33] he was entitled to claim as a legitimate child in an

[30] *Op. cit.* (note 2, *supra*) at p. 81, note 81. The difficulty is discussed by Welsh at pp. 69 ff. See also note 46, *infra*.

[31] Dicey, Conflict of Laws (6th ed. 1949) 493, in the course of a criticism of *In re Bischoffsheim*, in which the difficulty did not occur because both parents were domiciled in New York at the time of the child's birth.

[32] [1948] Ch. 79, [1947] 2 All E.R. 830.

[33] Also perhaps New York conflict of laws: *supra*, note 6.

English succession, on the ground that his parents were domiciled in New York at the time of his birth and that by New York law he was legitimate. The result was that a child of unmarried parents (according to English law) was transformed in effect into a child born in lawful wedlock, because it was only in that character that he was entitled to claim in an English succession. Romer J. supported his conclusion only with some *dicta* occurring in legitimation (not legitimacy) cases that legitimacy is governed by the law of a child's domicile of origin—obviously *obiter dicta* as regards legitimacy, and not accurate as regards legitimation cases, because legitimation is governed not by the law of the child's domicile of origin, but by the law of the father's domicile.[34] It is true that in the *Bischoffsheim* case both parties were domiciled in New York at the time of the child's birth and therefore the logical difficulty, already noted, of determining a child's domicile of origin in a case in which the parents are domiciled in different countries and the child's legitimacy is in question, did not exist. In deference to the *Bischoffsheim* case, limited to the situation in which the child is legitimate by the law of the domicile or domiciles of both parents at the time of the child's birth, the editors of the new Dicey have formulated clause 2 of rule 120 in the following terms:

> 120. (2) A child not born in lawful wedlock is (*semble*) legitimate in England if, and only if, he is legitimate by the law of the domicile of each of his parents at the date of his birth.

The editors[35] have so formulated the clause, with admitted doubt, in "an attempt to reconcile the actual results of the cases", notwithstanding their own devastating criticism of the decision in the *Bischoffsheim* case.[36]

The editors add a proviso, adopted by analogy from the legitimation case of *Birtwhistle* v. *Vardill*,[37] and later decisions in the following terms:

> Provided that a child who is legitimate under clause (2) of this Rule cannot (*semble*) succeed as heir to English real estate, or to a dignity or title of honour or to an entailed interest in personalty, nor can anyone except his issue inherit such a dignity or title or estate from him as heir.

With the greatest respect it is submitted that the compromise expressed in clause (2) of rule 120 is a regrettable concession to the "authority" of the *Bischoffsheim* case, and that it confuses

---

[34] Dicey, Conflict of Laws (6th ed. 1949) 491, 492.

[35] The special editor of this portion of Dicey is Welsh, and at p. 494 credit is given to Morris for suggesting the formula adopted in clause 2.

[36] *Op. cit.* at pp. 491–494.

[37] Note 20, *supra*.

the principle, implied in one of the theories stated in the extended comment on rule 120, that is, that the question is not whether a child is legitimate under a foreign law, but whether he is within the definition of a child in English succession law. On this broad principle, assumed though not expressly stated in *Brook* v. *Brook*, and necessarily implied in the judgment of Bennett J. in the *Paine* case, the result of the prohibited degrees cases seems to be that the decision of Romer J. in the *Bischoffsheim* case stands alone, in giving effect to the legitimacy under a foreign law so as to enable a child, illegitimate by English law, to take in an English succession.

The foregoing is of course not a complete statement of the situation, because we still have to consider the bigamous marriage cases, and in particular *Shaw* v. *Gould*,[38] a case which has been the subject of a great deal of explanation, or criticism disguised under the form of explanation, and which requires somewhat full discussion for the purposes of the present article. In *Shaw* v. *Gould* *A* (John Wilson) bequeathed one moiety of his personal estate in trust for his great-niece *B* (Elizabeth Hickson) for her life, and after her death upon certain trusts for the benefit of her *child, children,* or *issue,* and in case she should not have any child or issue, upon trust for his nephew. *A* was domiciled in England at the time of his death. He owned land situated in England, and he devised his real estate upon trusts for the benefit of *B* during her life, remainder to the first and other sons lawfully begotten of *B* in succession in tail, remainder to the use of the daughters lawfully begotten of *B* as tenants in common in tail, and remainder to the use of the testator's nephew, etc. In 1828 *B,* induced by the fraud of one Buxton, married him in England, he being domiciled there. Buxton was indicted for his fraud and was sentenced to a term of imprisonment, and the marriage was not consummated. In 1844 *B* and one John Shaw, desiring to marry each other, induced Buxton for a money consideration to go to Scotland and reside there for a time which was alleged to be sufficient to confer jurisdiction upon the Scottish courts to grant a divorce, and in the result the Court of Session in Scotland in 1846 granted a decree dissolving the marriage of *B* and Buxton on the ground of Buxton's adultery committed in England.[39] Buxton then returned to England, and continued

[38] (1868), L.R. 3 H.L. 55, House of Lords, dismissing an appeal from Kindersley V.C. in *In re Wilson's Trusts* (1865), L.R. 1 Eq. 247.

[39] The Scottish court decided that it had jurisdiction, but it would appear that it ought to have decided that it had no jurisdiction, because on the facts it is clear that Buxton was not at any time domiciled in Scotland:

to be domiciled there until his death in 1852. *B* and Shaw were, later in the year 1846, married in Scotland, and Shaw acquired a domicile of choice in Scotland, which continued until his death in 1852. Three children, *C*, *D* and *E*, were born of this marriage, and in 1865 they by their next friend presented a petition to the Lord Chancellor praying for maintenance out of the trust funds, which had been paid into court after the death of *B* in 1863. The petition was opposed by the testator's nephew and others, who claimed that *C*, *D* and *E* were not the children of *B*, because she was still Buxton's wife when she married Shaw, the Scottish divorce being invalid. The petition was dismissed by Kindersley V.C. and *C*, *D* and *E* appealed to the House of Lords.

Inasmuch as *Shaw* v. *Gould* has been analyzed in different ways by different writers the foregoing statement has been made as purely factual as possible, so as not to prejudge the problem of characterization, that is, of segregating the legal questions involved and the selection of the proper law governing each question. The judgments in the House of Lords were devoted almost exclusively to the single question whether the Scottish divorce was valid or not. On the other hand, there was relatively little discussion of the question whether, or why, the petitioners' claim as successors must stand or fall on the answer given to the question of the validity of the divorce. The members of the House of Lords were unanimous in holding (as Kindersley V.C. in the court below held) that the Scottish divorce was invalid. In the actual circumstances, that is, of an appeal to the House of Lords from an English court administering assets situated in England in an English succession, it was inevitable that English law (including English conflict rules) as to divorce jurisdiction and the recognition of foreign divorces should be applied, and the obvious result was that the Scottish divorce was not entitled to recognition in England, the husband (Buxton) being domi-

Dolphin v. *Robins* (1859), 7 H.L.C. 390, 3 Macq. 563, 7 R.C. 714; *Pitt* v. *Pitt* (1864), 4 Macq. 627; *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 105; *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146, at pp. 152, 158, 162, 170, 171 (on an appeal to the House of Lords from the Court of Session in Scotland). The case of *Shaw* v. *Gould* was, however, decided on the supposition that the divorce was valid by Scottish law, and the discussion of the case in the present article is based on that supposition. Two Scottish advocates (L.R. 1 Eq. at pp. 248, 249) said that the judgment of the Scottish court was in accordance with the law of Scotland, as understood by Scottish lawyers, at the time when the judgment was pronounced, but candidly admitted that "the correctness of the judgment may now be doubted, in consequence of the recent decision of the House of Lords in *Pitt* v. *Pitt*". They said, however, that according to the law of Scotland a "reduction" of the decree of divorce could not be obtained on the ground of want of jurisdiction or collusion because more than a year and a day had elapsed since the decree was pronounced.

ciled in England though temporarily resident in Scotland. If in converse circumstances the forum had been Scottish, that is, if the appeal to the House of Lords had been from a Scottish court, administering assets situated in Scotland in a Scottish succession, the House of Lords would of course have applied Scottish law in deciding the question of the validity of the divorce.

The result would not be so obvious if we supposed, alternatively, that the appeal to the House of Lords was (1) from an English court administering movables situated in England belonging to the estate of a deceased person domiciled in Scotland, and (2) from a Scottish court administering movables situated in Scotland belonging to the estate of a deceased person domiciled in England.[40] One solution might be that the House of Lords would in each case apply the law of the forum (including the conflict rules of that law), and in the first case hold that the divorce was invalid, and in the second case hold that the divorce was valid. The decision as to the validity of the divorce would thus agree with what would clearly be the decision of an English court and a Scottish court respectively if the question of the validity of the divorce had to be decided as the sole question. Another solution might be that the House of Lords would in each case apply the proper succession law, and in the first case hold that the divorce was valid, and in the second case hold that the divorce was invalid, on the theory that the question of the validity of the divorce is preliminary or incidental[41] to the main question of succession, and should be decided in accordance with the law governing the main question. One objection to this solution would be that an English court in a case involving the single question of the validity of the divorce would hold the divorce to be invalid, and in a succession case governed by Scottish law would hold the same divorce to be valid. The case of *Shaw* v. *Gould* itself does not precisely involve the doctrine of the preliminary or incidental question, because the main question (succession) by English conflict of laws was governed by English law, not a foreign law,[42] but it has been suggested that

[40] The two hypothetical cases must of course be limited to succession to movables, because if the subject matter were land, the proper succession law would be the *lex rei sitae*.

[41] What is usually called the "preliminary question" (*question préliminaire, Vorfrage*) might better be called the "incidental question", as suggested by Wolff, Private International Law (1945) 206, and approved by Cheshire, Private International Law (3rd ed. 1947) 128, and by Dicey, Conflict of Laws (6th ed. 1949) 73 (at the beginning of a succinct discussion of the general problem, with references to earlier writers).

[42] Robertson, Characterization in the Conflict of Laws (1940) 149 (cf. The "Preliminary Question" in the Conflict of Laws (1939), 55 L. Q. R. 565, at p. 581); Dicey, Conflict of Laws (6th ed. 1949) 74.

the case "does present an incidental question of the second degree", and that the view that "the incidental question should be determined by the conflict of laws rule of the forum" is "the more consistent with the approach adopted by the House of Lords in *Shaw* v. *Gould*".[43] The same general conclusion is concisely stated by Cheshire[44] as follows:

> What [Anglo-American judges] do in practice, in circumstances which are said by jurists to raise this controversy, is generally to separate the incidental from the principal question, and to apply the appropriate English choice of law rule to each.

If we turn now to the question whether, or why, the consequence of the invalidity by English law of the divorce in *Shaw* v. *Gould* was that the petition of *C*, *D* and *E* was dismissed, we come to the fundamental problem of characterization arising in *Shaw* v. *Gould*, namely, whether the question was (1) one of succession, or (2) one of status. If the question was one of succession, the proper law was English law, and by reason of the invalidity of the divorce by that law, *C*, *D* and *E* were not born in lawful wedlock, and not entitled as successors under the description "children". If the question was one of status, it might be argued that by Scottish law the divorce would be valid and *C*, *D* and *E* would be children born in lawful wedlock, and entitled as successors under that description. The argument for the claimants would have to be expressed in this way, because there was no subsequent legitimation, and, if the divorce was invalid, the doctrine of putative marriage was inapplicable in the particular circumstances.[45] In any event the case presents in concrete form the same logical difficulty as has been already discussed in connection with *In re Paine*,[46] of referring the child's legitimacy to the law of his domicile of origin, because if *C*, *D* and *E* were legitimate their domicile of origin was in Scotland where their parents were domiciled at the time of their birth, but if they were illegitimate their domicile of origin was in England, where their mother was in law domiciled by reason of Buxton's English domicile.

[43] Dicey, Conflict of Laws (6th ed. 1949) 75, 76.

[44] Private International Law (3rd ed. 1947) 129. While I agree with Cheshire's general conclusion (cf. my Essays on the Conflict of Laws (1947) 104), I am, with respect, unable to agree with his criticism (pp. 498–513) of *Shaw* v. *Gould*, or with the criticism of the same case in Wolff, Private International Law (1945) 358, 392 ff., or in Rabel, Conflict of Laws: a Comparative Study, vol. 1 (1945) 545, 550, 568, 569. It is submitted that the criticism of these writers is vitiated by the failure to give effect to the distinction between questions of status and questions of succession.

[45] See § 5, *infra*.

[46] See notes 30 and 31, *supra*.

In the court below Kindersley V.C. held that the question was one of succession law, including the definition of child, or son or daughter lawfully begotten, following *Boyer* v. *Bedale*,[47] in which Sir W. Page Wood V.C. had held that in an English will "child" was to be construed as meaning a child born in lawful wedlock, excluding a child legitimated under a foreign law by the subsequent marriage of his parents. Kindersley V.C. was unfortunate in his use of *Boyer* v. *Bedale*, because in *In re Goodman's Trusts*[48] it was afterwards held by a majority of the Court of Appeal, in effect, that a child in English succession law did include a child legitimated by the subsequent marriage of his parents under the law of the foreign domicile of his father.[49] The latter case, like the former, being a case relating to subsequent legitimation, as regards which the governing law is the law of the domicile of the father, could not be authority for the view that a child's legitimacy is governed by the law of the child's domicile of origin, though *dicta* in the *Goodman* case were the chief "authority" cited for that view by Romer J. in the *Bischoffsheim* case.

In the House of Lords all the judgments proceeded on the theory that the invalidity of the divorce by English law was fatal to the petitioners' claim, but only Lord Chelmsford stated expressly and clearly why this was so. The concluding paragraph of his reasons for judgment is as follows:[50]

> Whatever may be the view of the Scotch courts as to the legitimacy of the appellants, your Lordships are called upon to determine whether they answer a particular description upon principles of English law, and by the rules of construction of an English will. It is clear that the words 'son lawfully begotten' and 'children' in the will in question can apply only to a legitimate son or to legitimate children, and that the appellants, not having the character of legitimacy according to English law, cannot take under these descriptions.

It was also argued on behalf of the appellants that they were legitimate by the law of Scotland on the doctrine that their parents' marriage, though invalid, was a putative marriage. Lord Chelmsford answered this argument on two grounds, (1) that even by Scottish law the doctrine of putative marriage was inapplicable to the particular case, and (2) that in any event the doctrine could not be recognized so as to qualify the offspring

---

[47] (1863), 1 Hem. & M. 798, 33 L.J. Ch. 283.
[48] (1881), 17 Ch. D. 266. See § 7, *infra*.
[49] Subject of course to the exception stated in *Birtwhistle* v. *Vardill*: see § 7, *infra*.
[50] L.R. 3 H.L. 55, at p. 80.

of a void marriage to take under the description of "children" in an English will.[51]

The other members of the House of Lords did not spell out their reasons for applying English law to the petitioners' claim, but they unanimously dismissed the appeal from Kindersley V.C. without dissenting from his statement, or from Lord Chelmsford's statement, that the question was whether the petitioners were born in lawful wedlock within the description of child, or son or daughter lawfully begotten in an English will, and by implication they held that this question was governed by English law and consequently that the answer to this question depended on the validity or invalidity of the divorce by English law.[52] It is submitted that the general principle applies also to a case of intestacy, that is to say, that if the succession is governed by English law, a person claiming as child of the intestate must bring himself within the definition of child in English law.

5. *A Child of a Putative Marriage*

Our hypothetical succession law, the law of *X*,[53] might define a child as including a child of an invalid, but putative, marriage. If *X* is England or any other common law country, the child of a putative marriage would apart from statute be excluded from the definition of child, but if *X* is, for example, Scotland, France, Italy or Quebec, such a child might be included. In *Shaw* v. *Gould*,[54] as already mentioned, it was held that the doctrine of putative marriage could not be invoked to qualify the claimants as children under the definition of children under English succession law. Furthermore, Lord Chelmsford held that even if the proper succession law had been Scottish, the claimants could not invoke the doctrine because there was merely a mistake of law (as to the validity of the divorce) on the part of their parents, not a mistake of fact (as to the existence of the prior marriage)

[51] *Ibid.*, at p. 79; cf. Lord Colonsay's observations about the Scottish doctrine of putative marriage, at p. 97. See also § 5, *infra*.

[52] With respect, I agree with Welsh, *op. cit.* (note 2, *supra*) at p. 85, that *Shaw* v. *Gould* is a "binding expression of a comprehensive principle" (in effect as stated in the text) and disagree with Cheshire, Private International Law (3rd ed. 1947) 509, that "the House of Lords lost its direction through its persistent concentration upon one general principle to the exclusion of others": cf. Taintor, Legitimation, Legitimacy and Recognition in the Conflict of Laws (1940), 18 Can. Bar Rev. 589, at pp. 599, 600. *Shaw* v. *Gould* is cited many times in Dicey, Conflict of Laws (6th ed. 1949); see especially pp. 74 ff., 490 ff. (including an effective criticism of the effort to distinguish the case made by Romer J. in the *Bischoffsheim* case).

[53] See the concluding part of § 3, *supra*.

[54] (1868), L.R. 3 H.L. 55.

within the following definition of a putative marriage quoted from the evidence of Scottish advocates:[55]

> That is, a marriage regular and solemn in point of form, but null in law, because of the existence of an impediment such as a prior existing marriage of one of the parties, both or either of the parties being ignorant of the existence of the prior marriage.

The doctrine of putative marriage is stated as follows in Gloag and Henderson, Introduction to the Law of Scotland (2nd ed. 1933) 567:

> A putative marriage is one contracted in the *bona fide* belief on the part of one, or both, of the parties that they are free to marry, whereas there is in fact an impediment to the marriage. In these circumstances, although there is no marriage, yet by reason of the good faith of one or both of the parties, the children procreated before the impediment is discovered are according to the institutional writers entitled to the status of legitimacy;[56] and it has been so held in recent decisions in the Outer House of the Court of Session.[57] According to Lord Fraser the marriage must be a regular one and the error must be one of fact and not of law.[58] In *Purves Trs.* v. *Purves*[59] an averment by the parents of a child, the mother being the niece of the father's deceased wife, that they had married in ignorance that parties so related were forbidden to marry was held irrelevant as an averment of such *bona fides* as would save the legitimacy of the child.

For the purposes of the present article I am concerned only with the general principle that a person may be a legitimate child under the doctrine of putative marriage by the law of one country, but will not be entitled to claim in that character as successor under the succession law of another country if that law does not include the doctrine of putative marriage. It is not necessary for me to discuss the doctrine of putative marriage itself. That doctrine may vary in different countries. For example, what was said in *Shaw* v. *Gould* as to the inapplicability of the doctrine in the particular circumstances even if the proper succession law had been Scottish law, namely, because the mistake was a mistake of law, not a mistake of fact, seems to be difficult to reconcile with the case of *Stephens* v. *Falchi*[60] decided by the Supreme Court of Canada on appeal from Quebec. In the latter case the plaintiff was held entitled to claim in the character of putative husband against the estate of a woman whom he married in

---

[55] L.R. 3 H.L. at p. 79. See also *In re Stirling*, [1908] 2 Ch. 344.
[56] Stair III, 3, 41; Erskine, Inst. I, 6, 51; see *Brymer* v. *Riddell* (1811), Bell's Report of a Case of Legitimacy.
[57] *Smijth* v. *Smijth* (1918), 1 S.L.T. 156; *Petrie* v. *Ross* (1896), 4 S.L.T. 63.
[58] Fraser, 33 and 34.
[59] (1896), 22 R. 513.
[60] [1938] S.C.R. 354, [1938] 3 D.L.R. 590.

France after a French tribunal had pronounced a decree dissolving her first marriage. The proper law of succession was the law of Quebec, the forum was Quebec and the divorce was invalid according to Quebec conflict of laws (identical with the conflict rules of England and the common law provinces of Canada, as regards the recognition of foreign divorces) because both parties to the first marriage were British subjects domiciled in Quebec. The mistake, as to the validity of the divorce, was a mistake of law according to *Shaw* v. *Gould*, but nevertheless it was held in *Stephens* v. *Falchi* that the second marriage was a putative marriage contracted in good faith. The putative husband was an Italian national, and it was stated or assumed that the Italian doctrine of putative marriage was the same as the Quebec doctrine, and it was held that the second marriage had such "civil effects" *quoad* property as were consistent with the continued existence of the first marriage and of the relation of husband and wife between the parties to the first marriage, including the British nationality of the wife. Again, in *Berthiaume* v. *Dastous*[61] it was held by the Privy Council on appeal from Quebec that a marriage celebrated in France according to the rites of the Catholic Church between parties domiciled in Quebec was invalid because there had been no civil marriage as required by French law, but it was nevertheless held that the marriage was a putative marriage contracted in good faith, producing civil effects including the putative wife's right to alimony.[62]

6. *A Child of a Polygamous Marriage*

In the next place, the law of *X*, our hypothetical proper law of succession, might define a child as including a child of a polygamous marriage, but, it is submitted, would not do so if the proper succession law were English. Nevertheless such child might be a legitimate child under a foreign law, the law of *Y*, and be recognized as legitimate in England. The result would thus be strictly in accordance with the general principle advocated in the present article, namely, that a child may have the status of a legitimate child by the law of one country and his status may be recognized in another country, but he may not be entitled to claim under the succession law of the latter country. There is, however, some difference of opinion as regards the applicability of the

[61] [1930] A.C. 79, [1930] 1 D.L.R. 849.

[62] The judgment of the Privy Council delivered by Lord Dunedin was severely criticized by LeMesurier (1930), 8 Can. Bar Rev. 697, as regards the particular application of the doctrine of putative marriage.

general principle to the case of the child of a polygamous marriage, and the question requires some further discussion.

In *Hyde* v. *Hyde and Woodmansee*[63] it was held by Sir J. P. Wilde (afterwards Lord Penzance) that a suit for divorce would not lie in England in respect of a polygamous marriage celebrated in Utah in accordance with the common custom of the Mormons.[64] The decision was limited specifically to the point that the English law of divorce was appropriate only to a marriage in the sense of a "voluntary union for life of one man and one woman, to the exclusion of all others". It would seem to follow that a suit for annulment of a polygamous marriage would not lie in England. In the British Columbia case of *Lim* v. *Lim*[65] the parties had been married in China (where they were then domiciled), polygamy being lawful by the law of the place of celebration, and the man having already one wife. Subsequently the man and his second wife came to Canada (the woman being admitted as the man's wife) and acquired a domicile of choice in British Columbia and resided there as husband and wife. They duly registered in British Columbia the births of their four children, all born there. The first wife continued to reside in China and she was still alive at the time of the bringing of an action in British Columbia by the second wife for alimony. Coady J., following *Hyde* v. *Hyde*, dismissed the action.

Various writers had advanced the view that nevertheless some measure of recognition should be given in England to polygamous marriages celebrated in countries in which polygamy was permitted, at least if the parties were domiciled there,[66] and while this view was supported by cases decided by courts in Canada,[67] in the United States[68] and by the Privy Council, it was not until 1946 that it was expressly upheld by an English court. In *Baindail*

[63] (1866), L.R. 1 P. & D. 130, 5 R.C. 833.

[64] The English court "wrongly assumed polygamy to be legal" in Utah: 2 Beale, Conflict of Laws (1935) 700. Various mistatements contained in the judgment are noted by Vesey-Fitzgerald, Mixed Marriages, in Current Legal Problems 1948 (Faculty of Laws, University College, London), 222 ff.

[65] [1948] 2 D.L.R. 353, [1948] 1 W.W.R. 298.

[66] Lorenzen, Polygamy and the Conflict of Laws (1923), 32 Yale L.J. 471, reprinted in his Selected Articles on the Conflict of Laws (1947) 394; Vesey-Fitzgerald, *Nachimson's* and *Hyde's Cases* (1931), 47 L.Q. R. 253; Beckett, The Recognition of Polygamous Marriages under English Law (1932), 48 L.Q. R. 341; Falconbridge, Report to the International Congress of International Law (The Hague, 1932), published in part, *sub tit.* Conflict of Laws as to Nullity and Divorce, [1932] 4 D.L.R. 1, and reproduced in Essays on the Conflict of Laws (1947) 650; Johnson, Conflict of Laws, vol. 1 (1933) 309; Cheshire, Private International Law (1st ed. 1935) 291, (3rd ed. 1947) 395.

[67] Falconbridge, Essays on the Conflict of Laws (1947) 655 ff.

[68] 2 Beale, Conflict of Laws (1935) 698; Goodrich, Conflict of Laws (3rd ed. 1949) 370.

v. *Baindail*[69] the Court of Appeal affirmed a decision of Barnard J., who had followed his own decision in an earlier case of *Srinivasan* v. *Srinivasan*.[70] The effect of these decisions was that a polygamous marriage celebrated abroad and valid under a foreign law, so far from being annullable in an English court, was itself recognized in England as a valid matrimonial union which was inconsistent with a subsequent marriage in England of one of the parties, and therefore afforded ground for the annulment in England of the subsequent marriage. The actual decisions in these cases are not relevant to the question which is of interest for the purpose of the present article, namely, what, if any, are the rights of the children of a polygamous marriage as successors on their father's death. There were, however, references in both cases to certain *dicta* of Lord Maugham L.C. contained in a speech made before the Committee of Privileges of the House of Lords in the *Sinha Peerage Claim*[71] and these *dicta* will require further consideration.

In the *Baindail* case the man in question was a Hindu domiciled in India who had in India married a woman according to Hindu rites, and the marriage was potentially polygamous "by the customs and laws of the Hindu race". The woman being still alive, the man went through the form of marriage in England with another woman, who, on learning of the earlier marriage, sued the man for a declaration of the nullity of their marriage. The court made the declaration asked for. In the Court of Appeal Lord Greene M.R. (with whom Morton and Bucknill L.JJ. concurred), held (1) that the man, by the law of his domicile at the time of the Hindu marriage, acquired the status of a married man by Hindu law, (2) that this status ought to be recognized in England, and (3) that this status was inconsistent with the validity of the marriage of the man and another woman in England. The course of reasoning is elliptic and calls for some conjectural elaboration. On the first and second points the validity of the potentially polygamous Hindu marriage and its recognition in England would seem to depend on a combination of the law of the domicile with the law of the place of celebration, or perhaps the identity of the two laws, so that the man's status as a married man is the result of the marriage being celebrated in a country in which polygamy is recognized, between parties there

[69] [1946] P. 122.

[70] [1946] P. 67. Vesey-Fitzgerald, Mixed Marriages (note 64, *supra*) notes that the form *Srini Vasan* appearing in the Law Reports is incorrect.

[71] Journals of the House of Lords, 1939, vol. 171, p. 350, reprinted in a note appended to the report of the *Baindail* case, [1946] 1 All E.R. 348.

domiciled or between parties one of whom is domiciled there. On the third point, the inconsistency between the man's status as a married man and his subsequent marriage in England to another woman depends on the hypothesis that any marriage celebrated in England in an authorized English form is either monogamous or void. Furthermore it may be interjected that a marriage celebrated in England in any form other than an authorized English form is void, so that any attempt by the man to marry a second wife in England in pursuance of the polygamous Hindu marriage would be futile.

Questions as to the degree of recognition that should be accorded to foreign polygamous marriages and the extent to which effect should be given to them in England have been the subject of renewed and valuable discussion in England in recent years.[72] It is outside the scope of the present article to discuss the ramifications of the problems connected with foreign polygamous marriages. It may be admitted that any recognition in England of the validity of a Hindu marriage involves at least the invalidity of a second marriage in England, and consequently that a declaration of the nullity of the second marriage is justified. What is of especial interest for the purpose of the present article is the question whether the recognition in England of the validity of the Hindu marriage might involve other consequences, including any rights of succession in England of a child of that marriage, and Lord Greene's *obiter dicta* as to this question must be carefully considered. His discussion of the question includes sound and valuable observations that it "would be wrong to say that for all purposes the law of the domicile is necessarily conclusive as to capacity arising from status. There are some things which the courts of this country will not allow a person in this country to do whatever status with its consequential capacity or incapacity the law of his domicile may give him."[73] In an earlier passage, after saying that unquestionably the man's status was that of a married man, he added:[74]

> Will that status be recognized in this country? English law certainly does not refuse all recognition of that status. For many purposes, quite obviously, the status would have to be recognized. If a Hindu domiciled

[72] *E.g.* Welsh, Legitimacy in the Conflict of Laws (1947), 63 L.Q. R. 65, at pp. 88 ff.; Cheshire, Private International Law (3rd ed. 1947) 395 ff.; Dicey, Conflict of Laws (6th ed. 1949) 224 ff., 488, 762, 763; Vesey-Fitzgerald, Mixed Marriages (note 64, *supra*).

[73] This language is reminiscent of Allen's article on Status and Capacity, discussed in § 2, *supra*. The article was cited in argument, but was not mentioned in the judgment.

[74] [1946] P. at pp. 127, 128.

> in India died intestate in England leaving personal property[75] in this country, the succession to the personal property would be governed by the law of his domicile; and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage and of his Hindu widow, and for that purpose the courts of this country would be bound to recognize the validity of a Hindu marriage so far as it bears on the title to personal property left by an intestate here; one can think of other cases.

The foregoing passage, limited to succession to movables, is a clear enough statement of the general principle: the proper succession law would be the law of the domicile of the *de cujus* at the time of his death, and by that law the children and widow would be within the description in that law of the classes of persons entitled as successors to movables situated in England. The confusion begins only when Lord Greene next proceeds to quote the following passage from Lord Maugham's speech in the *Sinha Peerage* case:[76]

> On the other hand it cannot, I think, be doubted now, notwithstanding some earlier dicta by eminent judges, that a Hindu marriage between persons domiciled in India is recognized in our courts, that issue are regarded as legitimate and that such issue can succeed to property, with the possible exception to which I will refer later.

Presumably Lord Greene considered this statement to be consistent with his own, and assumed that Lord Maugham meant to refer to a case (as the actual case before him was) of a man domiciled in India at the time of his marriage and at the time of his death; and Lord Greene refrained, presumably deliberately, from quoting the following later passage from Lord Maugham's speech (which had been quoted by Barnard J. in the *Srinivasan* case:

> Having regard to the domicile of the parties at the date when it was solemnized, the marriage would properly be treated as valid in this country for all purposes, except it may be the inheritance of real estate before the Law of Property Act, 1925, or the devolution of entailed interests as equitable interests before or since that date, and some other exceptional cases.

Lord Greene's own language is consistent with an intelligible and reasonable theory which might be expanded (without doing violence to what I venture to think he intended to say) as follows:

(1) The validity of the Hindu marriage as a polygamous marriage depended in England on the domicile of the parties (or at least of the man) in India at the time of the marriage. The

[75] Obiovusly meaning "movables".
[76] Note 71, *supra;* [1946] 1 All E.R. 348.

marriage was a potentially polygamous marriage and could not in any circumstances be regarded as a monogamous marriage, and if the man had been domiciled in England, instead of India, the so-called marriage would be disregarded, or treated as void, in England.

(2) Assuming that the marriage would in England be regarded as a valid polygamous marriage by reason of the man's domicile in India at the time of its celebration, the rights of succession, on the man's death, of his children and widow would depend on the proper succession law. (a) As regards movables situated in England the succession would be governed by the law of the domicile of the man at the time of his death, so that if he was domiciled in India at that time the children and the widow would be entitled as successors in accordance with Hindu law. If he was domiciled in England at the time of his death his children and widow would not be entitled as successors, they not being within the description of persons entitled under English succession law. (b) As regards land situated in England the proper succession law would be English law, and the children and wife would not be entitled as successors.

Before examining further the language of Lord Maugham's *dicta* and attempting to estimate their exact significance or authority in connection with the general question of polygamous marriages and rights of succession, I think it is important to bear in mind the precise question which had to be decided in the *Sinha* case. The question was whether the petitioner was entitled to be summoned to Parliament as Baron Sinha of Raipur, or, in other words, whether he was the "heir male of the body of [the first baron] lawfully begotten" within the terms of the letters patent creating the barony. The first baron and his wife were at all times domiciled in the Presidency of Bombay in India. They were both Hindus and their marriage was celebrated in India according to the formalities prescribed by Hindu law and usage. By Hindu law a plurality of wives is not prohibited, and the marriage was therefore potentially polygamous, but the man did not in fact marry any other woman, and before the petitioner's birth the man and woman joined a religious sect known as the Sadharan Brahmo Samaj, of which they remained members during the whole of their married life. One of the main tenets of the sect is monogamy, so that so long as the man continued to be a member he could not, while his wife lived, contract a second marriage which the courts of India would recognize as valid, though he could have left the sect at any time, and might

then have validly married a second woman. Inasmuch as the petitioner was the eldest son of the first baron and the first baron's only wife, no fault can be found with the conclusion that the petitioner was entitled, on his father's death, to be summoned to Parliament as Baron Sinha of Raipur. Indeed, in a case "without precedent in peerage law", one might say that it would be contrary to common sense to apply rules of construction of English succession law to the construction of a grant of a barony to a Hindu domiciled in India who was domiciled there at the time of his death, and it is respectfully suggested that even if the first baron and his only wife had not joined a monogamous sect, but had continued to be domiciled in India, their eldest son by a potentially polygamous marriage would have been entitled to succeed as second baron on his father's death. Lord Maugham refrained from expressing any opinion on this particular question, and discussed it only inferentially when he pointed out some of the difficulties of construing the terms of the patent so as to include the son of a second marriage born before a son of the first marriage, and then confined his opinion to the case of a man domiciled in India who according to his religion at the date of the patent was prohibited from forming a polygamous union.

The limitation last mentioned seems to suggest the theory (1) that a marriage may be potentially polygamous and valid as such by reason of the domicile of the parties at the time of its celebration, but not valid in all respects as a monogamous marriage would be, (2) that by the man's joining a sect which prohibits polygamy before he marries a second wife, the marriage becomes a monogamous marriage and valid as such, and (3) that if the man subsequently leaves the sect which prohibits polygamy, the marriage becomes again a potentially polygamous marriage, convertible then at the man's option into an actually polygamous marriage. Furthermore, two passages from Lord Maugham's speech have, as we have already seen, been torn from their context and quoted as if they were considered statements of general principles of marriage law and succession law without the slightest regard to the limitations which might otherwise be inferred from the context. I have already said something about these *dicta* and have only a couple of further observations to make.

If Lord Maugham meant that a valid polygamous marriage by the law of the domicile of the parties at the time of the marriage is equivalent to lawful wedlock in English law,[77] with the

result that for all purposes the marriage would be valid in England, and the domicile at death would be immaterial so far as the validity of the marriage is concerned even for the purpose of succession under English law, it is submitted that the somewhat casually expressed *dicta* in question are not capable of supporting the weight of a proposition of law so important and far-reaching. In Dicey[78] it is cautiously stated that "there is, for instance, no authority as to what the position would be if the deceased died domiciled in England, having contracted a Hindu marriage, or marriages, while domiciled in India"; and, as already noted, Lord Greene refrained from quoting one of the two relevant passages in Lord Maugham's speech and stated his own proposition limited to the case of a Hindu dying domiciled in India. Furthermore, the exceptions suggested by Lord Maugham are also puzzling in themselves. If, as he thought, the marriage was in the particular circumstances equivalent to lawful wedlock, the claimant would of course be entitled to claim in the character of a child born in lawful wedlock, and the suggestion of exceptions to his right to claim would be inappropriate.[79] Again, if Lord Maugham considered it proper to mention exceptions relating to inheritance of real estate or the devolution of entailed interests, why did he not mention the exception relating to succession to a title of honour, and explain why that exception did not apply to the case in question?

Before leaving Lord Maugham and the *Sinha* case I cannot refrain from quoting, without prejudice, the following observations of Vesey-Fitzgerald:[80]

> The *Sinha Peerage* case in many ways goes further than the two subsequent decisions just discussed. In that case Maugham L.C. with the concurrence of Lords Atkin, Russell of Killowen, Macmillan and Wright[81] gave the definition of polygamous marriage for which we have long contended — 'a marriage which did not forbid a plurality of wives and where there has been in fact a plurality of wives'. He noted in support of that definition that a Hindu marriage between persons domiciled in India is recognized in our courts. It is true that by way of strengthening his argument he relied also on the fact that the spouses shortly afterwards adhered to a monogamous form of Hinduism. This further ground was probably unnecessary: but assuming that it was necessary, the acquisition of an English domicile would equally have had the effect

[77] This is what Welsh (*op. cit.* note 72, *supra*) at p. 91, seems to deduce from Lord Maugham's language. This is not so stated, however, in Dicey, Conflict of Laws (6th ed. 1949) 489 (edited by Welsh), or at pp. 224 ff. (edited by Cross).

[78] 6th ed. 1949, p. 225.

[79] Cf. Dicey, Conflict of Laws (6th ed. 1949) 225, note 67, referring to p. 429, note 46a.

[80] Mixed Marriages (note 64, *supra*) at p. 232.

> of removing any doubts as to the monogamous character of the marriage. Such an acquisition of English domicile must clothe the parties with the whole status of married persons in English law. Nothing therefore remains of *Hyde* v. *Hyde* except as an authority on the jurisdiction of the Divorce Court: and even in that narrow sphere it is so clearly contrary to justice that its authority must be doubtful. Why should the parties to a *de facto* monogamous marriage be denied the protection of the courts of their domicile which alone determines their matrimonial status?

The reasons for judgment of Stirling J. in the much discussed case of *In re Bethell* [82] are obscure and unsatisfactory, but it would appear that the decision was right in the result, on either one of two grounds, namely, (a) the English domicile of Christopher Bethell at the time of the marriage, or (b) his English domicile at the time of his death. On the death of Christopher Bethell, it was contended on behalf of his infant daughter that she was entitled as successor under a trust created by a codicil to the will of Bethell's father. The defendants in the action were the trustees to whom the testator had given land situated in England (both real property and leasehold) upon trusts for sale for the benefit of any child of Christopher Bethell him surviving; and the plaintiff was the person entitled in the event of Bethell's death without leaving any child. The infant claimant was the daughter of Christopher Bethell and Teepoo, whom Bethell had married in South Africa in a portion of Bechuanaland inhabited by the Baralongs beyond the limits of the British dominions. Teepoo was the daughter of the chief of the Baralong tribe, and by the custom of the tribe a man might in addition to his first or "great" wife, have any number of other wives, who would have a status in the home almost equal to that of the first wife, although the latter would continue to be the "principal" wife. On the evidence it was clear that Bethell intended his marriage with Teepoo to be marriage in the Baralong sense and in accordance with Baralong custom. The chief asked him if he would marry Teepoo "in church", but he answered, "no, I am a Baralong; did you marry your wife in church, did you not also marry in the custom as I am about to do?" Stirling J. held that the infant was not entitled to claim as a child of Bethell under the trusts above mentioned, because the marriage was a marriage in the Baralong sense and therefore was not a valid marriage in English law as defined in *Hyde* v. *Hyde*. The

---

[81] And Lord Onslow, the lay member of the Committee of Privileges; Lord Thankerton did not dissent.

[82] *In re Bethell; Bethell* v. *Hildegarde* (1880), 38 Ch. D. 220.

reasoning is reminiscent of the former tendency in English law to regard all polygamous marriages as void, but the decision was right as applied to the particular case of a man domiciled in England. As we have seen, a man domiciled in a country where polygamy is permitted may in that country contract a valid polygamous marriage, but a domiciled Englishman has not that privilege or capacity. Stirling J. mentioned that the chief clerk's certificate of Bethell's English domicile at the time of the marriage had not been excepted to. Therefore Bethell's marriage with Teepoo could not be regarded in England as a valid polygamous marriage, and of course there was no question on the facts of its being a valid monogamous marriage. Alternatively, even if Bethell's marriage could be regarded in England as a valid polygamous marriage (it was of course so regarded in the Baralong tribe), the child of the marriage would not come within the definition of "child" in English succession law. So far as the assets of the estate consisted of land held upon trust for conversion, but not yet converted, English law *qua* the *lex rei sitae* would be the proper succession law. As regards the movable assets, English law would be the proper succession law if Bethell was domiciled in England at the time of his death. It is true that Stirling J. did not appear to attach any importance to the question of Bethell's domicile at the time of his death, and he made no finding on this question; but he noted that Bethell did not intend to remain in Bechuanaland, and that he kept up communications with various members of his family down to shortly before his death, and from time to time expressed his intention to return to England. There can be little doubt therefore about Bethell's English domicile at the time of his death.

7. *A Child Legitimated by the Subsequent Marriage of his Parents*

We pass now from cases of original legitimacy to cases of subsequent legitimation. Our hypothetical succession law, the law of *X*,[83] might define a child as including a child illegitimate at birth, but subsequently legitimated by the marriage of his parents. Whether the law of *X* so defines a child is one question, a question of succession, and whether a particular child is so legitimated is another question, a question of status governed by, say, the law of *Y*. As already noted, it may easily happen that *X* and *Y* are different countries, because the proper law of succession to the estate of *A*, our hypothetical *de cujus*, is either

[83] See the concluding part of § 3, *supra*.

the law of the domicile of *A* (as to movables) or the law of the situs of the assets (as to land), whereas the proper law of the status of the child as a legitimated child is the law of the domicile of the child's father.

The distinction between succession law and status law is strikingly exemplified if we suppose *X* to be England and *Y* to be a foreign country, because at common law the definition of a child for the purpose of succession might be (a) in one respect narrower, and (b) in another respect wider, than the definition of a legitimated child under the law of the foreign domicile of the child's father.

(a) Even if a child was legitimated by the subsequent marriage of his parents under the law of the foreign domicile of his father at the time of the child's birth and at the time of the subsequent marriage, it did not follow that he was entitled to claim as successor in England, because by English succession law he was, as regards land situated in England, excluded from the class of children entitled to claim as heir to real property on intestacy,[84] or under a devise to the heir of *A*.[85] In such case it is obviously impossible to say that there is any general principle that the child's right to claim as successor is a question of status governed by the foreign law. His status as a legitimated child was clear, but he was nevertheless not entitled to claim under English succession law. On the other hand, he was entitled to claim as successor to real property under a devise to him as child,[86] or as successor to movables either on intestacy[87] or under a bequest to a child,[88] or as successor to an interest in land which is classified as personal property (for example, a leasehold estate) either on intestacy or under a bequest to a child.[89] In these cases also the child's status was clear, but his right to claim as successor depended not on his status alone, but also upon English succession law. It is of course immaterial

[84] See *Birtwhistle* v. *Vardill* (1840) 7 Cl. & F. 895, 51 R.R. 139, 5 R.C. 748, in § 4, *supra;* cf. *Re Don's Estate* (1857), 4 Drew. 194 (no one entitled to claim as successor to the child except the child's own issue). The rule would also seem to apply to a claim of succession to a peerage: *The Strathmore Peerage Claim* (1821), 6 Bli. (N.S.) 487, 54 Lords Journal 554 (where it was held, however, that the claimant had not been legitimated); *Shedden* v. *Patrick* (1854), 1 Macq. H.L. Cas. 535; Cheshire, Private International Law (3rd ed. 1947) 528, note 1; Dicey, Conflict of Laws (6th ed. 1949) 502, citing also *The Sinha Peerage Claim,* [1946] 1 All. E.R. 348 (as to which see § 6, *supra*).

[85] Dicey, Conflict of Laws (6th ed. 1949) 503.

[86] *In re Grey's Trusts,* [1892] 3 Ch. 88.

[87] *In re Goodman's Trusts* (1881), 17 Ch. D. 266.

[88] *In re Andros* (1883), 24 Ch. D. 637.

[89] Westlake, Private International Law, §§ 126, 178; Dicey, Conflict of Laws (6th ed. 1949) 503.

to the present discussion that the rule of English succession law excluding the legitimated child from claiming as heir has ceased to be important in England[90] and has probably been abolished by the legitimation statutes of Ontario and of the other common provinces of Canada.[91]

(b) As a general rule[92] the definition of a child in English succession law included a child whose parents had intermarried after his birth if the child's father was domiciled both at the time of the child's birth[93] and at the time of the subsequent marriage in a foreign country the law of which "allowed of" (to use Dicey's expression) legitimation of a child by the subsequent marriage of his parents. The statement is limited to a "foreign" country, because if the father was domiciled in England at either of the times mentioned, the subsequent marriage of his parents would not by the former law of England have any legitimating effect. In the case of a foreign country the statement does not require that the child be automatically legitimated by the subsequent marriage. It is sufficient if the law of the foreign domicile "allowed of" legitimation by subsequent marriage in the sense that this form of legitimation was recognized by that law, even though some additional act of recognition or adoption was required by that law. It might happen therefore that a child was recognized in English succession law as a legitimated child entitled to succeed notwithstanding that by the law of the father's domicile, by reason of the lack of the further act required by that law, he was not legitimated.[94]

It thus appears (a) that a child's status as a legitimated child did not necessarily entitle him to claim as successor under English law and (b) that in some circumstances a child might be entitled to claim as successor under English law in the character of a legitimated child although he was not strictly speaking legitimated under the foreign law. In other words, the child's right

---

[90] Cheshire, Private International Law (3rd ed. 1947) 528; Dicey, Conflict of Laws (6th ed. 1949) 502.

[91] See the concluding paragraph of the present § 7, *infra*.

[92] Subject to the exceptions stated in paragraph (a), *supra*. Subject also, if the question is the meaning of "child" in a will, as distinguished from the meaning of "child" on intestacy, to any indication in the will itself of the intention of the testator as to the meaning of child. See note 18, in § 3, *supra*.

[93] *In re Wright's Will Trusts* (1856), 2 K. & J. 595; *In re Grove* (1888), 40 Ch. D. 216. This requirement for the recognition in England of legitimation by subsequent marriage under a foreign law was discussed and criticized in *In re Luck's Settlement Trusts*, [1940] Ch. 864, at pp. 908 ff., by Scott L.J., who, at p. 919, referred to it as the *Wright-Grove* rule. As to the *Luck* case, see § 8, *infra*.

[94] Dicey, Conflict of Laws (6th ed. 1949) 497, note 87, and rule 121.

to claim as successor depended always on whether he was within the definition of child in English succession law and was not a mere question of status governed by the foreign law. This mode of statement is in accord with the mode of statement advocated and adopted in the earlier sections[95] of the present article, but admittedly is not in accord with some of the *dicta* occurring in judgments in the English legitimation cases, some of which have been already cited.[96] My submission is that, broadly speaking, certain decisions were right in the result, but that the *dicta* in question were wrong.

The confusion of *dicta* began perhaps in connection with the overruling of the case of *Boyer* v. *Bedale*[97] in *In re Goodman's Trusts*.[98] In the *Boyer* case it was held that in English succession law a child did not include a child legitimated by the subsequent marriage of his parents under the law of the foreign domicile of his father, and, as we have seen,[99] the case was cited by Kindersley V.C. in *In re Wilson's Trusts*,[100] a legitimacy case, not a legitimation case, in support of the principle that a child's right to claim as successor under English succession law depended on his being a child within the meaning of that law, and not on his being legitimate under a foreign law. His decision was affirmed in *Shaw* v. *Gould*[101] by the House of Lords, which approved of the principle above stated, though of course it did not have to express an opinion, and did not express an opinion, on the actual decision in the *Boyer* case. That decision was subsequently overruled by the majority of the Court of Appeal in the *Goodman's Trusts* case, and there is no reason for finding fault with this result. It would seem to be desirable that a child in English succession law should be construed as including a child legitimated by the subsequent marriage of his parents under the law of his father's foreign domicile in a situation outside of the rule in *Birtwhistle* v. *Vardill*; but, consistently with the reasoning adopted by the House of Lords in that case, it would seem to be impossible to explain the result in *Goodman's Trusts* case on the ground suggested in the latter case that the question was one of status and not of succession, because in the *Birtwhistle* case the child was legitimated under the foreign law

[95] See §§ 4, 5 and 6, *supra*.
[96] And, as we have seen, these *dicta* in legitimation cases misled Romer J. in *In re Bischoffsheim*, [1948] Ch. 79, [1947] 2 All E.R. 830: see § 4, *supra*.
[97] (1863), 1 Hem. & M. 798, 33 L.J. Ch. 283.
[98] (1881), 17 Ch. D. 266.
[99] See § 4, *supra*.
[100] (1865), L.R. 1 Eq. 247.
[101] (1868), L.R. 3 H.L. 55.

and yet was held not entitled to claim as successor under English succession law. The erroneous *dicta* expressed in somewhat vague terms in the *Goodman's Trusts* case were developed, logically enough, in *In re Andros*[102] in the proposition that "a bequest in an English will to the children of *A* means legitimate children, but the rule of construction goes no further. The question remains Who are his legitimate children? That certainly is not a question of construction of the will. It is a question of status." Obviously, it is submitted, these *dicta* are inconsistent with the approach adopted by the House of Lords in *Birtwhistle* v. *Vardill* and in *Shaw* v. *Gould*.

For the purpose of the present article it is unnecessary to make a more complete review of the cases, and it is sufficient to refer in a footnote to discussion elsewhere.[103]

It is also unnecessary to make any detailed references here to the Legitimacy Act, 1926, which not only changed the domestic law of England, but also changed the English conflict rule, so that if the father was at the time of the subsequent marriage domiciled in a foreign country by the law of which the child became legitimate by virtue of the marriage,[104] the child is recognized in England as having been legitimated from the date of the coming into force of the statute or the date of the marriage, whichever last happens,[105] notwithstanding that at the time of the child's birth the father was not domiciled in a country in which legitimation by subsequent marriage was permitted by law.[106] For the present purpose it is sufficient to note that a person legitimated under the statute, although he has the status of a legitimated child, does not necessarily become entitled to claim under English succession law, because his right to claim as successor is subject to exceptions, stated as follows:[107]

> (a) He cannot take by descent an entailed interest created before the date of legitimation;

[102] (1883), 24 Ch. D. 637, at p. 639.

[103] See especially Mann, Legitimation and Adoption in Private International Law (1941), 57 L.Q.R. 112, at pp. 129 ff.; Welsh, *op. cit.* (note 72, *supra*) 75 ff.; Cheshire, Private International Law (3rd ed.) 511 ff.; Dicey, Conflict of Laws (6th ed. 1949) 501, especially note 11, with cross-reference to note 31 on p. 504; Taintor, Legitimation, Legitimacy and Recognition in the Conflict of Laws (1940), 18 Can. Bar Rev. at pp. 712, 713 (cf. pp. 591, 592).

[104] The statutory rule is stricter than the common law rule, the latter, as already noted, only requiring that the foreign law "allow of" legitimation and subsequent marriage.

[105] That is, under the statute the legitimation is operative *a praesenti*, whereas at common law it was operative *ab origine*.

[106] Abolishing, as regards legitimation under the statute, the so-called *Wright-Grove* rule (note 93, *supra*).

[107] Dicey, Conflict of Laws (6th ed. 1949) 510.

(b) He cannot succeed to any dignity or title of honour;
(c) He cannot take property real or personal limited to devolve with any such dignity or title of honour;
(d) He ranks in relative seniority as if he had been born on the day on which he became legitimated by virtue of the statute.

In other words even the statute preserves the distinction between the recognition of the child's status under the foreign law and the child's right to claim under English succession law.

In Ontario and the other common law provinces of Canada legitimation statutes were passed during the years 1921 to 1928 in pursuance of a recommendation of the Conference of Commissioners on Uniformity of Legislation in Canada made in 1920. These statutes provide in general terms that "if the parents of any child heretofore or hereafter born out of lawful wedlock have heretofore intermarried or hereafter intermarry such child shall for all purposes be deemed to be and to have been legitimate from the time of birth". In other words, a child whose parents have intermarried after his birth is, in the particular province, legitimated *ab origine* without regard to the law of his father's domicile at any time, and whether or not the law of his father's domicile recognizes the legitimating effect of subsequent marriage.[108] The result would appear to be that the rule in *Birtwhistle* v. *Vardill* is abolished. The statute even has the effect of giving the legitimated child ancestors and collateral kindred.[109] Nevertheless each of the provincial statutes preserves the distinction between status and succession by providing that nothing in the statute "shall affect any right, title or interest in or to property if such right, title or interest has been vested before" the coming into force of the statute, or in the case of a future marriage, before such marriage. In Ontario the statute also provides that a child born while his father was married to another woman or while his mother was married to another man "shall not inherit in competition with the lawful children of either parent".

8. *A Child Legitimated by his Father's Recognition*

Our hypothetical succession law, the law of *X*,[110] might define a child as including a child illegitimate at birth but subsequently legitimated by the recognition or acknowledgment of his father.

---

[108] *Re W.* (1925), 56 O.L.R. 611, [1925] 2 D.L.R. 1177: a child was held to be legitimated in Ontario although at the time of the subsequent marriage in England in 1881 the father was domiciled in England.

[109] *Re Cummings*, [1938] O.R. 654, [1938] 4 D.L.R. 767, C.A., overruling *Re W.* on this point.

[110] See the concluding part of § 3, *supra*.

If *X* is England, and the father is domiciled in England at the time of the recognition, the child is of course not within the definition of child in the law of *X*, and is not entitled to claim as successor, because legitimation by recognition is unknown to the domestic law of England. On the other hand, if the father is domiciled in a foreign country *Y*, by the domestic law of which a child is legitimated by his father's recognition, two questions may arise (a) whether the child's status as a legitimated child is recognized in England, and (b) whether he is entitled to claim under English succession law. The mere fact that the status of a child legitimated by recognition is unknown to English law is of course not a reason why the child's status under the law of *Y* should not be recognized in England,[111] but another question is whether he is entitled to claim under English succession law. It would have been regrettable, but it would not have been altogether surprising, if an English court had given a negative answer to the latter question, but when the question arose in *In re Luck's Settlement Trusts, In re Luck's Will Trusts,*[112] the court, instead of giving this simple answer, impliedly expressed the opinion, if it did not decide, that a child legitimated by recognition under the law of the father's domicile both at the time of the child's birth and at the time of his subsequent recognition by his father would, broadly speaking, have been entitled to claim in the character of child in English succession law.[113] In the particular situation the rule in *Birtwhistle* v. *Vardill* was inapplicable, and the child's claim under his grandfather's will was not affected by the rule against perpetuities, although it would appear that the rule against perpetuities rendered invalid his claim under the marriage settlement of his grandparents.[114] What I have suggested as the implied opinion of the court on the broad question follows, it is submitted, from the fact that the majority of the Court of Appeal denied the child's claim on the specific ground that his father was domiciled in England at the time of the child's birth, though domiciled in California when by recognition he legitimated the child under Californian law. In other words, the court applied to legitimation by recognition the *Wright-Grove* rule[115] derived from cases relating to legitimation by subsequent marriage. The decision has been criti-

---

[111] Dicey, Conflict of Laws (6th ed. 1949) 467, 468.
[112] [1940] Ch. 864, C.A., reversing [1940] Ch. 323.
[113] This was admitted by counsel for the appellant in the Court of Appeal.
[114] The majority of the Court of Appeal refrained from discussing this question in view of the denial of the child's claim on another ground.
[115] See note 93, *supra*.

cized by various writers.[116] One of the grounds of criticism is that the court was not justified in using the analogy of legitimation by subsequent marriage, in applying to legitimation by recognition a rule which was applicable at common law, but is not applicable under the Legitimacy Act, 1926, to legitimation by subsequent marriage; and that the rule applicable at common law to legitimation by subsequent marriage which operated retrospectively or *ab origine* is especially inappropriate to legitimation which operates only prospectively or *a praesenti*; and that in the *Luck* case the child's claim under his grandfather's will might have been supported without any relation back of his legitimation to the time of his birth. There was no evidence that the domicile of the child's mother, and therefore that of the child, was in California at the time of the child's birth. They may have been domiciled in California at the time of the father's recognition of the child, but the majority of the Court of Appeal considered the evidence of this to be insufficient, and decided the case on the basis of the father's domicile, not the child's domicile.

9. *An Adopted Child*

For the purpose of the present article a relatively brief discussion of the status of an adopted child and its incidents will be sufficient. The status exists in the domestic laws of England and the provinces of Canada only by virtue of modern statutes.[117] Some of these statutes contain provisions dealing with some of the conflict of laws aspects of adoption, but they do not furnish general or comprehensive conflict rules relating to the recognition in one country of the status of an adopted child acquired under the law of another country and his rights of succession, if any, under the law of the former country. If a father adopts his own illegitimate child under one of these statutes, the situation presents an obvious analogy to legitimation by recognition, already discussed; but normally the adopter and the adopted child are strangers in blood, and in that situation there is no useful analogy to legitimation by recognition.

[116] Taintor, *op. cit.* (note 103, *supra*), at pp. 611ff., 619, 621ff.; Mann, *op. cit.* (note 103, *supra*), at pp. 116ff.; Falconbridge, Legitimation by Subsequent Marriage and by Adoption or Recognition (1941), 19 Can. Bar Rev. 37, reproduced in Essays on the Conflict of Laws (1947) 593; Cheshire, Private International Law (3rd ed. 1947) 517ff.; Dicey, Conflict of Laws (6th ed. 1949) 505–507, and other references there given.

[117] In chronological order, New Brunswick (1890), Nova Scotia (1896), Alberta (1913), British Columbia (1920), Ontario (1921), Manitoba (1922), Saskatchewan (1922), Quebec (1924), England and Wales (1926), Prince Edward Island (1930), Newfoundland (1940).

Dicey[118] states the following rule:

> 123. (1) If a person adopts a stranger in blood, the law of the domicile of the adopter and of the person adopted at the date of the adoption determines (*semble*) whether the adopted person has the status of an adopted child.
>
> (2) The question whether an adopted child can succeed as a child to movables or immovables under an intestacy or a will is (*semble*) determined by the law of the domicile of the testator or intestate at the date of his death in the case of movables and the *lex situs* in the case of immovables.

The foregoing rule, as far as it goes, would seem to embody a reasonable conjecture with regard to the treatment of adoption in the conflict of laws. It is in accord with the principle advocated in the present article, namely, that the status of a person and his right to claim as successor are two separate questions. It fails, however, to deal with the more difficult problem which arises if at the time of the adoption the adopter is domiciled in one country and the adopted child in another. This problem is of course interesting and important, and is complicated by the fact that the statutes relating to adoption are so diverse in both their express provisions and in their implications. They all have the primary purpose of providing for domestic adoption, but differ in their provisions with regard to domestic succession and the meaning of "child" in a will. Some provide even for domestic succession by virtue of foreign adoption.[119] The problem as a whole is, however, beyond the scope of the present article.

---

[118] Sixth edition (1949) 511ff. For discussion of the problem, see also Restatement of the Conflict of Laws (1934), §§ 35, 142, 143, 247, 305; 2 Beale, Conflict of Laws (1935) 713–716, 967, 973, 1034; Mann, *op. cit.* (note 103, *supra*) at pp. 122ff.; Wolff, Private International Law (1945) 404–409; 1 Rabel, Conflict of Laws: a Comparative Study (1945) 632–658; Cheshire, Private International Law (3rd ed. 1947) 522–524; Falconbridge, Essays on the Conflict of Laws (1947) 584ff. (with reference to provisions of various provincial statutes); Goodrich, Conflict of Laws (3rd ed. 1949) 449ff., 501, 502.

[119] My review of the statute law *op. cit.* (note 118, *supra*) is limited to the laws of England and the provinces of Canada. The topic is amply discussed, with reference to the laws of many countries, by Rabel, *op. cit.* (note 118, *supra*). His exposition and analysis afford indispensable material for further investigation with the view of developing socially satisfactory conflict rules.